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JSN
JAN
IGM

v.2

REPORTS OF CASES

ARGUED AND DETERMINED

IN

The Court of Queen's Bench,

AND UPON

WRITS OF ERROR FROM THAT COURT TO THE

EXCHEQUER CHAMBER,

IN

TRINITY AND MICHAELMAS TERMS, 1837.

BY

SANDFORD NEVILE, ESQ.

AND

THOMAS ERSKINE PERRY, ESQ.

OF THE INNER TEMPLE, BARRISTERS AT LAW.

VOL. II.

WITH

AN INDEX OF THE PRINCIPAL MATTERS.

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J U D G E S
OF THE
COURT OF QUEEN'S BENCH,

During the Period of these Reports.

The Right Hon. THOMAS LORD DENMAN, C. J.

The Hon. Sir JOSEPH LITTLEDALE, Knt.

The Hon. Sir JOHN PATTESON, Knt.

The Hon. Sir JOHN WILLIAMS, Knt.

The Hon. Sir JOHN TAYLOR COLERIDGE, Knt.

ATTORNEY-GENERAL.

Sir JOHN CAMPBELL, Knt.

SOLICITOR-GENERAL.

Sir ROBERT MOUNSEY ROLFE, Knt.

A

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF KING'S BENCH,

IN

TRINITY TERM,

IN THE SEVENTH YEAR OF THE REIGN OF WILLIAM IV.

The Judges in Banc this Term were,
Lord DENMAN C. J. PATTESON J.
LITTLEDALE J. WILLIAMS J.

In the Bail Court,
COLERIDGE J.

SMITH v. DIXON.

1837.

Monday,
May 22d.

DECLARATION stated, that whereas the defendant had bought of the plaintiff a large quantity, that is to say, not than 5000, nor more than 6000 trees, to be taken up at the proper time of the year, to be delivered to the defendant's order, and to be paid for on delivery. Averment, that the plaintiff properly took up 6000 trees, at the proper time of the year, and tendered them to the defendant, but that the defendant refused to accept them. Plea, first, that the plaintiff did not properly take up or tender or offer to deliver to the defendant 6000 trees: Held, on special demurrer, that the plea was not ill, although it tendered a traverse on the number of trees, as the plaintiff had made the number material by his allegation in the declaration, which was without a *videlicet*: secondly, that the plea was bad for duplicity, for traversing both the proper taking up, and the offer to deliver the trees.

The second plea averred, that by the custom of trade (without averring what trade) the plaintiff ought not to have taken up the trees, without the defendant's order: Held, bad.

The third plea, which averred that the trees which the defendant bargained for, were trees growing in A., and that the trees which plaintiff tendered were not such trees, was held to amount to the general issue.

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less than 5000, nor more than 6000, oak trees, not less than two feet and a half, nor more than three feet in height; and also 10,000 oak trees, not less than one foot and a half, nor more than two feet in height, the said oak trees respectively to be well taken up by the plaintiff, at the usual time of the year, and within a reasonable time afterwards to be delivered by plaintiff to defendant's order at B., in the county of L., and paid for on delivery: and in consideration thereof plaintiff promised to take up the said oak trees as aforesaid, and to deliver the same to defendant, at the time and place aforesaid: the defendant promised to accept and pay for them. Averment, that the plaintiff afterwards, to wit, on 10th February, 1835, well and properly took up for the defendant 6000 oak trees, not less than &c., and 10,000 oak trees, not less than &c., which said 10th February then was the usual and proper time of the year for taking up oak trees as aforesaid. That plaintiff tendered and offered to deliver the said oak trees, but defendant refused to accept, whereby the oak trees perished, and became of no value, &c. Damages 100*l*.

Plea 2. That the plaintiff did not well and properly take up, or tender or offer to deliver to the defendant or his order at B. aforesaid, 6000 oak trees, being not less &c., and 10,000 oak trees, being not less &c.

3. That the said oak trees in the declaration mentioned were to be delivered by plaintiff to defendant's order at B., in manner in the declaration in that behalf mentioned, and that it was the duty of plaintiff, according to the usage and custom of trade, and according to and in compliance with the terms of the said supposed contract of bargain and sale in the declaration mentioned, to have abstained from taking up for or offering to deliver to the defendant the said oak trees, or any of them, until he the defendant should have given to the plaintiff an express order so to do, or until a reasonable time for defendant's giving such express order should have elapsed: that defendant had not given any such order, nor had a reasonable time elapsed: and that by

means of the said premises the oak trees, if the defendant had taken or accepted them, would have been of little or no value to him, &c.

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4. That the said oak trees, which the defendant bargained for and bought of the plaintiff, as in the declaration mentioned, were oak trees then being and growing in a certain nursery ground of the plaintiff, at M. R., in the county of L., and that the said oak trees, which the plaintiff so took up and offered to deliver to defendant in manner in the declaration in that behalf mentioned, were not the same trees which the defendant bargained for and bought, as in the declaration mentioned, nor were trees which, at the time of the said bargain and sale, were growing in the said nursery ground of the plaintiff at M. R.

Special demurrer to second, third, and last pleas. The Second plea. causes of demurrer to the second plea were, that it is double, in denying both the taking up and the tender: that in denying that the plaintiff well and properly took up the oak trees, it contains a negative payment: and that the traverse contained in it is too large in making the exact number and exact height of the oak trees material to the issue. To the third, Third plea. that it does not traverse, or confess or avoid the contract, but sets up a different one: that it argumentatively denies the bargain and sale, and also that the time when the plaintiff took up the trees was usual and proper, and also that it amounts to the general issue, &c. To the last plea, that Fourth plea. it is an argumentative denial of the bargain and sale, and of the breach and delivery, and amounts to the general issue, &c.

Archbold argued in support of the demurrers, in Easter term last (April 25) (a). The second plea is bad on two grounds. First of all it is bad for duplicity, as it avers that the plaintiff did not properly take up the trees, or offer to deliver to the defendant. Those averments should have

First point:
Second plea
bad for dupli-
city.

(a) Before Lord Denman C. J., Littledale, Patteson, and Coleridge Js.

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Second point:
Second plea
bad, in tra-
versing a
particular
number.

formed two pleas. In the *Doctrina Placitandi* (a), it is laid down, that if the defendant plead to an action on an award *nul tiel arbitrement fait ou deliver a lui*, it is bad for duplicity, citing *Dyer* 242 a; 15 *Hen.* 7, 10. [Coleridge J. Is not the taking up part of the act of delivery? it is clear that he could not perform the first, without the latter.] But the plea avers that he did not tender the trees. The plea is also bad, by having tied down the plaintiff to a particular number and size of the trees. The contract is for not less than 5000, and not more than 6000 trees. The plea avers, that the plaintiff did not take up and tender 6000 trees. If, therefore, he had taken issue upon this averment, and had proved a tender of any number less than 1000, he would have been beaten. [Patteson J. You have averred that you tendered 6000 trees. If that is a material averment, why should not the defendant take issue upon it? If the averment is not material in the declaration, it is not material in the plea.] The plea has not answered the averment in the declaration as to the contract. In *Newhall v. Barnard* (b) the declaration complained of the stopping up of three lights by the defendant. The defendant justified the stopping up of two lights, and part of the third light, and the Court held, on demurrer, that this did not answer the declaration.

Third point:
A custom of
trade averred,
without stat-
ing of what
trade.

Then in the third plea the defendant has imported a custom of trade into the contract, without averring what trade it is, and thus controlling the contract. This he cannot do; *Greaves v. Ashlin* (c).

Fourth point:
The fourth
plea amounts
to the general
issue.

The fourth plea clearly amounts to the general issue.

LORD DENMAN C. J. inquired of *Wightman* whether he could support all the pleas, and suggested that he had better amend.

Wightman requested that the case might stand over till Friday.

(a) Tit. Double Pleas, p. 136.
Ed. 1677.

(b) Yelv. 225.

(c) 3 Campb. 426.

Wightman, contrà. (Friday, April 28th.) The third plea is abandoned, but the defendant relies on the second and fourth. The second plea alleges that the plaintiff did not well and properly take up for or deliver to the defendant 6000 oak trees, not less than &c., and 10,000 oak trees, not less than &c. To this two objections are taken: the first, that a double issue is raised on the "taking up," and on the "delivering;" the other, that the traverse is too large in making the exact number of trees material to the issue tendered. As to the first objection, it is no doubt necessary that issue should be joined on one point, but not absolutely on one fact: and here the taking up and delivering constitute together a single material allegation; *Webb v. Weatherby* (a). As to the other point: the declaration states a contract to deliver not less than 5000, nor more than 6000, oak trees, and then proceeds to aver that the plaintiff did take up and deliver 6000, specifying the exact number. The plaintiff has therefore himself made the exact number material. He has in his declaration given no means whereby it can be ascertained that he is within the contract, except this allegation of a precise number: it became therefore necessary to traverse that number. The number is not even laid under a *videlicet*. [*Coleridge J.* Suppose this action had been brought before the new rules, and the general issue had been pleaded, would not the plaintiff have failed, if, after averring the delivery of 6000, he had proved the delivery of 5999? The form of the plea makes no difference.] It is submitted that he must have failed: if he offers a precise number, he must prove it. In a note to *Dakin's case* (b), Mr. Serjeant *Williams* says, that "the want of a *videlicet* will in some cases make an averment material, that would not otherwise be so; as if a thing, which is not material, is positively averred without a *videlicet*, though it was not necessary to be so, yet it is thereby made material, and must be proved. Therefore,

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Third point
abandoned.
First point.

Second point.

(a) 1 Bing. N. C. 502.

(b) 2 Saund. 291 c.

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where a party does not mean to be concluded by a precise sum or day stated, he ought to plead it under a *videlicet*; for if he do not, he will be bound to prove the exact sum or day laid, it being a settled distinction, that where any thing which is not material is laid under a *videlicet*, the party is not concluded by it, but he is where there is no *videlicet*; *Symmons v. Knox (a)*." This principle is recognized in *Arnfield v. Bate (b)*, and *Crispin v. Williamson (c)*. It is not contended that in every case where a *videlicet* is omitted, number becomes material; but in this case some number is material, from the peculiarity of the contract; and the plaintiff cannot shew himself within it, except by alleging some number. He has chosen to allege a precise one: what other can the defendant take for the purpose of traversing? Then as to the fourth plea: it is in substance that the trees, which the plaintiff took up and tendered, were not those which the defendant had bought. To this it is objected, that it amounts to the general issue. But the general issue is a denial of the contract; here the defendant admits the contract, but denies the delivery of those trees for which he contracted. But the defendant relies on the second plea, as that on which he is entitled to succeed.

Fourth point.

First point.

Archbold in reply. No answer has been given to the cases cited before, in order to shew that a plea like the second here pleaded is bad for duplicity. [*Patteson J.* Would this plea have been good, if it had merely traversed the taking up?] The case of *Webb v. Weatherby (d)*, cited on the other side, is beside the question. There the demurrer was to a replication. In a replication several facts may be put in issue, when they amount to one defence. This cannot be done in a plea, except the general issue. [*Cole-ridge J.* Do not a "taking up" and "delivery" constitute an entire allegation?] Then as to the other point, if before

Second point.

(a) 3 T. R. 65.

(b) 3 M. & S. 173.

(c) 8 Taunt. 107.

(d) 1 Bing. N. C. 502.

the new rules the plaintiff had averred a delivery of 6000, he might have recovered for an inferior number, notwithstanding the precision of that averment, if the general issue had been pleaded; and that is a sufficient argument to shew that the averment is not traversable in the present mode of pleading. For if the plea were good, and on the trial he proved a number short of 6000, he must fail altogether. The plea should have been, that the plaintiff did not tender or offer to deliver the trees in manner and form above stated.

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DIXON.*Cur. adv. vult.*

Lord DENMAN C. J. on this day delivered the judgment of the Court.

In this case the contract alleged in the declaration is, that the plaintiff sold to the defendant not less than 5000, nor more than 6000, oak trees, of a certain size; and 10,000 oak trees of another size, to be well taken up by the plaintiff, at the usual and proper time of the year, and to be delivered by him to the defendant within a reasonable time afterwards, at certain prices. The declaration then avers, that the plaintiff did well and properly take up for the defendant, at the proper time, 6000 oak trees of the one size, and 10,000 of the other, (without laying the number under a *videlicet*, or averring that the number of the first size was not less than 5000, or more than 6000,) and did within a reasonable time afterwards offer to deliver the said trees to the defendant.

The plea states, that the plaintiff did not well and properly take up for or offer to deliver to the defendant 6000 oak trees of the one size, and 10,000 oak trees of the other size, in manner and form as in the declaration alleged.

The plaintiff has demurred specially. The principal grounds of demurrer are—1st, That the defendant has made the number material by his plea, which he had no right to do. 2d, That the plea is double, because it traverses not only the well and properly taking up, but the subsequent offer to deliver.

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Second point.

On the first ground we are of opinion that the plea is good. The plaintiff has himself made the number material, by not averring that the number was within the limits prescribed by the contract. If that averment had been inserted in the declaration, the number would have been immaterial, and the question would have turned on the want of a *vide licet*. But as the declaration stands, it is only by taking the number stated as material, that the declaration itself can be supported; for so only is there any averment of performance of the condition precedent to take up a number of trees within the prescribed limits.

First point.

On the other ground, we are of opinion that the plea is bad. The well and properly taking up of the trees depends on the time and manner in which it was done, and is not necessarily coupled with any subsequent offer to deliver. If the plaintiff fails to prove the well and properly taking up, the defendant would be entitled to a verdict, though there had been an offer to deliver. On the other hand, if he fails to prove the offer to deliver, the same consequence would follow, though he should establish that the trees were well and properly taken up. Formerly, the plea of non assumption would have put in issue both facts; but now all facts intended to be denied must be specially traversed, yet not two by one traverse, as it is here. Judgment must be for the plaintiff.

Judgment for the plaintiff.



The KING v. The POOR LAW COMMISSIONERS.

In the matter of the Whitechapel Union.

May 23.

The Poor Law Commissioners have power under the 26th

THIS case was argued on this day by Sir *J. Campbell* A. G., Sir *W. W. Follett*, *Wightman*, and *Tomlinson*, for the section of 4 & 5 *Will.* 4, c. 76, (the Poor Law Amendment Act,) to unite parishes for the government of the poor, although one of those parishes has a local act for the management of the poor, and although neither the trustees nor guardians appointed under the local act, nor the rate-payers of the parish, consent to the union.

Poor Law Commissioners; and by Sir *F. Pollock*, *Cresswell*, *Bodkin*, and *Thomas*, *contra*(a). The facts and the arguments are fully detailed in the judgment of the Court, which was delivered in this term (June 12th) by—

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Lord DENMAN C. J. as follows:—This was a rule calling on the Poor Law Commissioners for England and Wales to shew cause why a writ of certiorari should not issue to remove into this Court a certain order under the hands and seal of the said Commissioners, dated the 21st day of January last, whereby it was ordered, that the parishes, townships, and places, the names whereof were specified in the margin of the said order, should, on the 16th day of February then next, be and thenceforth remain united for the administration of the laws for the relief of the poor, by the name of the Whitechapel Union; and that a board of guardians of the poor of the said union should be constituted and chosen according to the provisions of the Poor Law Amendment Act, and in manner thereafter mentioned. The rule was obtained by two of the trustees for maintaining and employing the poor of the Old Artillery Ground, being one of the places specified in the margin of the said order.

It appears by the affidavits, that the Poor Law Commissioners, acting under the 3 & 4 Will. 4, c. 76, formed several different parishes and places into one union, called the Whitechapel Union, of which the place called the Old Artillery Ground was one; and that in the Old Artillery Ground the administration of the laws for the relief of the poor was conducted under the directions of a local act of parliament.

The trustees and managers appointed under that act object to the order of the Poor Law Commissioners, as they say that the act of 4 & 5 Will. 4, c. 76, does not authorize them to include in any union any parish or place where the poor laws are administered under a local act of parliament.

(a) See the former case of *The King v. The Poor Law Commissioners*, ante, vol. i. 371.

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And it will, therefore, be necessary to advert to some of the clauses in the act, to see whether their power does or does not enable them to include the Old Artillery Ground in the union in question.

The first 14 sections relate to the establishment of the machinery under which the act is to be conducted, and some of the usual consequences.

The 15th section enacts, that the administration of relief to the poor according to the existing laws, or such laws as shall be in force at the time being, shall be subject to the direction and control of the Commissioners; and then the section goes on to state the general power of the Commissioners.

This section does not at all contemplate any exception or abridgment, as to locality, of the full powers given to the Commissioners over the whole of England and Wales.

The five sections next following give general directions not applicable to the question in discussion.

The 21st section enacts, that, unless in cases otherwise provided for by the act, all the powers and authorities given by the act of the 22 Geo. 3, c. 83, which is generally called *Gilbert's act*, and the 59 Geo. 3, c. 12, (*Sturges Bourne's act*), and every other act of parliament, general as well as local, relating to the poor, shall be exercised by the persons authorized by law to execute the same, under the control, and subject to the rules, orders, and regulations of the Commissioners. And the Commissioners, and their deputies, are authorized to attend at the parochial and local boards and vestries, and take part in the discussion, but not to vote.

This clause, therefore, in express terms, gives the Poor Law Commissioners, in some cases at least, a jurisdiction over parishes governed by local acts.

The 22d section also gives some authority to the Commissioners in parishes under local acts.

After three sections containing regulations not material to this question, comes the 26th section, upon which the question turns as to the power of the Commissioners on the subject

of this dispute. Section 26 is as follows :—" That it shall be lawful for the said Commissioners, by order under their hands and seal, to declare so many parishes as they may think fit to be united for the administration of the laws for the relief of the poor, and such parishes shall thereupon be deemed a union for such purpose ; and thereupon the workhouse or workhouses of such parishes shall be for their common use ; and the said Commissioners may issue such rules, orders, and regulations, as they shall deem expedient for the classification of such of the poor of such united parishes, in such workhouse or workhouses, as may be relieved in any such workhouse, and such poor may be received, maintained, and employed in any such workhouse or workhouses, as if the same belonged exclusively to the parish to which such poor shall be chargeable ; but notwithstanding such union and classification, each of the said parishes shall be separately chargeable with and liable to defray the expense of its own poor, whether relieved in or out of any such workhouse."

The language of this section is as general as possible, making no exception of any kind as to parishes or places already under unions, or under the regulation of local acts or otherwise. And it must, therefore, be so interpreted ; unless it shall appear from other parts of the act that its operation was meant to be qualified ; or that, by giving the full meaning and effect to the words, it should be found to have the effect of repealing, or be inconsistent, or interfere with some prior act of parliament connected with the same subject, when, taking the whole of this act and other acts together, it was not so meant. And in considering how far the provisions of a later act of parliament may interfere with those of a previous one, we entirely concur in the opinion of Lord *Kenyon*, in *Williams v. Pritchard* (a), quoted by my brother *Coleridge* in the case of the Poor Law Commissioners (b), that—" It cannot be contended that a subse-

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(a) 4 T. R. 2, 3.

(b) 1 N. & P. 376.

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quent act of parliament will not control the provisions of a prior statute, if it were intended to have that operation ; but there are several cases in the books to shew, that where the intention of the legislature was apparent that the subsequent act should not have such an operation, there, even though the words of such statute, taken strictly and grammatically, would repeal a former act, the Courts of Law, judging for the benefit of the subject, have held that they ought not to receive such a construction."

In considering the question, how far the general and extensive provisions of an act of parliament are to be qualified or controlled, either by other provisions in the same act, or by enactments in other acts, the principal object and general intent of the later act, which is to be interpreted, must always be borne in mind.

The great object of this act is to obtain an improvement in the management of the poor, and the legislature seems to have thought it was likely to be obtained by a uniformity in the system in the management of them.

A perfect uniformity it seemed difficult to obtain. But it seems to have been the object of the legislature to come as near to it as could be, either by enactments to be carried into effect immediately, or at other convenient times, and the Commissioners have accordingly been vested with powers to be exercised at such times as they may see occasion. And there is no doubt but that one of the most material variations in the system of the poor laws is authorized by this section : for whereas in former times, as, for instance, in the time of Queen *Elizabeth*, the poor laws were administered by parishes, it was considered in the time of *Charles* the 2nd, that in large parishes it might be better done in smaller districts, and which seemed to be the prevailing opinion for a long time ; but afterwards a contrary course seemed to be thought the more advisable, and the 22 *Geo. 3*, c. 83, commonly called *Gilbert's* act, was passed, which, instead of dividing the administration of the poor laws into townships or villages, (as by the act of *Charles*

the 2nd,) authorized the union of entire parishes: this, however, could only be done by a certain consent; but it is to be presumed that this union of parishes was found beneficial, because, by the act in question, the Commissioners are empowered of their own authority to make unions on a very extensive scale.

The 26th section having, therefore, in the most general terms, authorized unions, it is now to be considered whether, considering the qualifications and exceptions to which I have before adverted, they are prevented from including in a union a parish or place which is already governed by a local act of parliament, and in which many, if not all the powers and directions under which the general union is to be governed, and amongst other things a board of guardians, are already to be found; and which might, therefore, seem to render unnecessary any order of the Poor Law Commissioners as to its government.

The 28th section directs the Commissioners to make inquiries as to single parishes, with a view to forming unions.

The 29th directs a similar inquiry as to former unions, either under *Gilbert's* act or local acts, with a view to the future apportionment of expenses.

The 32d section is a very material one. The 26th having given the power to form unions, the 32d authorizes the Commissioners to declare any union, whether formed before or after the passing of the act, to be dissolved in any parish, to be added to or separated from such union, and to adapt the constitution, management, and board of guardians, to the altered state of things: and then the parishes separated from the union may be united to other parishes or unions; and the Commissioners are authorized to ascertain the proportionate value of the workhouses, and other things belonging to the parish, and gives directions on the subject. But this alteration is not to take place unless a majority of two-thirds of the guardians of the union shall concur on the alteration. And on this it is to be observed,

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that the consent is only required when unions are altered, and not when originally formed under section 26.

Now this mode of ascertaining the proportion of expenses had been directed by section 28, as to single parishes, and by the 29th, as to unions, under *Gilbert's* act and local acts; all the parishes, therefore, under the contemplation of both those sections, must be considered as being capable of forming part of the union thus authorized by the 32d section to be altered. And if unions of parishes under local acts might be made parts of a union under the act in question, so may a single parish possessing a local act.

The 37th section prohibits unions being formed under *Gilbert's* act without the consent of the Commissioners. The 38th section directs, that when parishes are formed into a union, there shall be a board of guardians, with particular directions relating to them. It is not, however, necessary to go through these particulars. One or two of the circumstances connected with the unions of parishes with local boards are worthy of observation. The 26th section itself provides, that notwithstanding the union there authorized, each of the parishes shall be separately chargeable with and liable to pay the expenses of its own poor, whether relieved in or out of the workhouse. The 27th permits, that, in any union, justices may direct, in certain cases, relief to persons not in the workhouse to be given, by whom the particular parish is chargeable. The relief cannot be given by the union guardians out of the union fund. Therefore the parish guardians, wherever there are such, will be the persons to give this relief. Again, section 38 enacts, that the workhouses of such union shall be governed, and the relief of the poor in such union shall be administered, by the board of guardians—not the out-door relief—evidently giving to the board the government only of matters wherein the parishes have a common interest. The same section makes the justices *ex officio* guardians of the united or common workhouses, (not of such union, nor

of such parish); and further provides, that no *ex officio*, or other guardian of any such board, shall act, except as a member, and at a meeting of such board.

Now section 54 is entirely confined to the relief of the poor of any parish which has a local board under this or any other act, or select vestry, and whether forming part of a union or incorporation, or not, and directs that such relief shall belong exclusively to such guardians of the poor or select vestry.

Some of the provisions relating to bastardy and removal lead to similar observations, and strongly support the inference, that parishes having local boards may be united with others, under the 26th section. We do not feel it necessary to discuss the judgment pronounced by us on the 39th section, though we were pressed at the bar with the consequences of it. We were told that the effect of it would be easily evaded, inasmuch as the Commissioners would be at liberty to unite every parish having a local board, though not to give a board to a single parish possessing already a board under a local act. But we are not to assume that the Commissioners will evade the law, or colorably unite a parish possessing a local board, merely because they have not the power to give them that constitution as single parishes. The power given by section 26 is given in different terms from that given by the 39th, and the Court has decided under different conditions. We have no right to doubt that both the one power and the other will be faithfully carried into execution. The vast and populous parishes for which local constitutions have been enacted, stand plainly in a very different condition from the small parishes which have been affected by *Gilbert's* act, or have obtained local acts for themselves. Whether it is or is not desirable that the former should remain single, and act on their existing regulations, there are obvious reasons for supposing that parliament would have been unwilling to disturb what it found there established. But to withhold the power of uniting every small parish, otherwise fit to be united, might

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have had the effect of preventing the operation of the new law over a large portion of the country. We find, accordingly, (as was, indeed, admitted in argument at the bar,) that the power of uniting is conferred without any restriction whatever, and have pointed out several sections in which the union of such parishes is clearly contemplated. Upon the whole, therefore, we are of opinion that the Commissioners have in this case exercised a lawful power, and that their order must be confirmed.

Rule discharged (a).

(a) There is another case upon the construction of the Poor Law Amendment Act which is not yet determined.

DOE, on the demise of MUDD, v. SUCKERMORE.

1. Evidence as to handwriting formed by the witness called on an immediate comparison at the trial, is inadmissible.

2. Where the signature of an attesting witness to a will was in dispute, and the witness, who was alive and called as a witness at the trial, admitted that certain specimens put into his hand were of his writing, and that signatures made to de-

EJECTMENT. At the trial of this cause, which lasted three days, at the Suffolk assizes, before *Vaughan J.*, it appeared that the lessor of the plaintiff claimed as heir at law, and the defendant as devisee under the will of the Rev. *Charles Mudd*, the person last seised. The will under which the defendant claimed, was admitted to bear the signature of the deceased, but it was alleged that the signatures of the attesting witnesses were forgeries. Those witnesses were all called, and they stated the attestation to be in their handwriting, and made to the will before the death of the testator. A witness for the lessor of the plaintiff stated, that he saw the will the day after Mr. *Mudd's* death, with his signature alone to it; and that, on the following day, he saw it with the signatures of the attesting witnesses affixed. *Stribling*, one of the attesting witnesses, admitted on cross-examination, that the signatures to two

positions in the Ecclesiastical Court were also his; an inspector at the bank, skilled in handwriting, who had gained a knowledge of the witness's handwriting by inspection of these admitted specimens before the trial, was called to prove that the attestation to the will was not in the handwriting of the witness: The evidence was held to be admissible per Lord *Denman C.J.* and *Williams J.*; inadmissible per *Patteson* and *Coleridge Js.*

depositions, produced by the officer of the Ecclesiastical Court, with the will attached to it, and made in a suit in the Ecclesiastical Court, were in his handwriting, but the depositions were not read; he also admitted that eighteen or nineteen detached signatures of his name, which were produced in Court, pasted on card board, were in his handwriting.

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On the part of the plaintiff, an inspector of powers of attorney at the Bank was called, who stated it to be his duty to compare the signatures to powers of attorney, with former signatures made by the parties. He stated that he had never seen *Stribling* write. It was proposed to put the depositions which the witness had heard *Stribling* acknowledge to bear his signature, into his hands, that he might say, on looking at the signatures to the will and to the depositions, whether they were in the same handwriting. On the question being objected to, *Vaughan J.* consulted Lord *Abinger C. B.*, who sent in the following answer, which was read in Court:—"It has long been considered that comparison of handwriting is not evidence before a jury, and I do not think the rule can be different because the witness, who compares, is an inspector of franks, or of powers of attorney at the Bank. The jury may, on inspection, exercise their own judgment; but it is not, I apprehend, the course to give specimens of other handwriting to the witness for inspection, unless they are upon documents, which for other purposes are made evidence in the cause. The ground on which the other handwriting is evidence is, that the witness has acquired from habit a knowledge of the character, which enables him to speak to his belief, without previous examination. It is every day's practice to refuse a witness the opportunity of that comparison in the witness box, if he desires to resort to it in order to give his opinion, and therefore, if he is called in here, and cannot give an opinion of the handwriting, without resorting to documents for the purpose of enabling him to determine, it is not receivable." His lordship

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thereupon ruled, that the comparison could not be made. The witness was then asked, whether he was acquainted with *Stribling's* handwriting? He stated that he had seen, before the trial, the signatures to the depositions, and the specimens which had been produced in Court, and which he heard *Stribling* acknowledge to be his, and that he thought, from his former examination of those specimens and depositions, that he knew *Stribling's* handwriting. He was then asked whether he believed the signature of *John Stribling* to the will to be written by him. This evidence was also objected to, and ruled to be inadmissible by the learned judge. He was then asked whether, on looking at the signature to the will, he believed it to be a genuine, or an imitated character of handwriting; he replied, that in his belief it was an imitation. This evidence was received.

Kelly, in Michaelmas term last, shewed cause (a). If a rule be obtained for a new trial, on the ground of improper rejection of evidence, it lies on the other side to shew that the evidence is admissible. If it be shewn that it is inadmissible, it is immaterial whether the right ground for rejecting it at the trial was assigned by the learned judge. The furthest extent to which the rule has been carried, of allowing an experienced witness to speak to handwriting, is, that he may give his opinion whether the writing in question is in a genuine or imitated character. That evidence was given in this case without objection. But the evidence which was attempted to be given amounts to this: "if the twenty or thirty documents produced to me are in *Stribling's* handwriting, then I believe the signature to the will is not in his handwriting;" the evidence, therefore, is founded solely upon comparison, which the law will not allow. If such evidence were admissible, how easily it would be, out of hundreds of specimens of a man's writing, collected at different periods of his life, to produce ten or twelve in Court that would correspond sufficiently with a

(a) Cor. Lord Denman C. J., *Patteson*, *Williams*, and *Coleridge* Js.

forged signature, to deceive the most experienced witness. It would no longer amount to the old rule at nisi prius, that a witness to handwriting must have *seen* the party write, or at all events have received letters in the way of business from him, and acted upon them, as in *Lord Ferrers v. Shirley*(a); but it is contended that a witness who has done neither one nor the other, may speak from writings put into his hand at the time of trial. Nor can it be said here that the witness has admitted the depositions and signatures to be of his handwriting; if they had been admitted before trial, *ante litem motam*, probably then a comparison might be made, as they would stand on the same footing as correspondence; but Lord Kenyon would not even allow a witness to speak to handwriting who had seen the defendant write before the trial for the purpose of shewing the witness his true way of writing; *Stranger v. Searle*(b). In that case, the evidence of a clerk at the post-office who was called to prove the forgery of the acceptance to a bill of exchange, by a comparison with authentic acceptances, was positively rejected; and although in a later case, *Allesbrook v. Roach*(c), Lord Kenyon allowed the jury to decide on the genuineness of an acceptance, by comparing the signature in question with other bills admitted to be authentic, it is believed that case has been overruled; and it is, at all events, distinguishable, as the bills put in were admitted to be the defendants, but no admission has been made here. The difference between letters which have been received in correspondence, and papers put into a witness's hand, is two-fold; first, when a correspondence has taken place with a witness before any controversy commenced, no suspicion of fraud can attach, and the knowledge of the handwriting acquired thereby is the strongest evidence, short of ocular proof: second, such a correspondence may be shewn to have been acted upon. But in the other case, there is nothing but the oath of the

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(a) Fitzg. 195.

(c) 1 Esp. 351.

(b) 1 Esp. 14.

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witness in the cause to be depended upon, so that, on fifty documents, put into a witness's hand, for the purpose of comparing with the writing in question, fifty distinct collateral issues would arise, as to the genuineness of each document. [Lord Denman C. J. That is the argument *ab inconvenienti* which Mr. Starkie has suggested in his treatise, and after all is perhaps the strongest argument, but I believe it has not been laid down anywhere.] It is submitted that the current of authorities corroborates it.

*Storks Serjt. and Byles, contra.* If the rules of evidence are to be discussed on their policy, the Court will hesitate before it deprives judicial investigations of the help of those proofs, which are every day used in commercial transactions, and which large establishments, like the Bank of England, have, after long experience, found to be practically efficacious in guarding against fraud. Even supposing the evidence in question to amount to a comparison of hands, still it was admissible under the circumstances. It is a general principle, that persons skilled in any art or mystery may give in evidence their opinion and belief on matters within their skill. This witness spends his life in practising the art of discriminating handwriting; his evidence, therefore, was on general principles admissible. If it be said that every man is skilled in the comparison of hands, and equally competent to judge by comparison, that is notoriously not so, and the practice of the Bank shews it. Besides, if that were so, persons of skill would not be allowed to say, that in their judgment a handwriting is an imitated one, which it is clear(a) and admitted in this case, that they may do. In answer to the objection, that an unfair selection of specimens might be made, that objection will not apply here. The eighteen signatures were proved to have been fairly taken from papers signed in the course of business, as bills of parcels, and bills of exchange, receipts, &c. Besides, all the signatures were, or might have become evidence in the cause. They were shewn to the writer, the attesting

(a) *Rex v. Cutor*, 1 Esp. 117.

witness, before the jury. If he hesitated about them, that was matter for the consideration of the jury. If he denied them, as his knowledge of his own handwriting was directly in issue, he might have been contradicted. In the case of *Doe v. Newton* (a), the attesting witness being dead, the documents could not have been made evidence. But even supposing that unfair selection of the eighteen signatures was possible, and that they were not and could not be made evidence in the cause, unfair selection of the signatures attached to the depositions was impossible, and those depositions were produced by the other side, tied to the will. They were, therefore, evidence as a document produced by the adverse party. If a jury, under these circumstances, can compare handwriting, which they could not otherwise compare, *Griffith v. Williams* (b), why should not a witness? But it is further urged, that to allow comparison of hands will introduce collateral issues as to the genuineness of the specimens with which the writing in question is compared. But that inconvenience already exists, where a witness speaks to the genuineness of handwriting from an impression derived from a letter he has received. The correctness of his knowledge depends on the genuineness of that letter. Even where he says he saw the party write, his knowledge depends on the issue, whether or no he did see the party write. And surely here, where the writer swears before the jury that the writing is genuine, and the witness called to compare swears that he heard that acknowledgment on oath, the issue is substantially the same, and proved by the same witness, as if the witness had sworn he had seen the party write. Besides, if comparison is confined to documents in evidence in the cause, there will be no collateral issues raised, for the jury must try the authenticity of those documents at all events. It has been asked by the Bench whether, in a criminal case, a prisoner is to be convicted of writing any document by mere similarity of hands. The answer is certainly not by such evidence *alone*, and that

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(a) 1 N. &amp; P. 1.

(b) 1 C. &amp; J. 47.

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has been considered to be law ever since the case of *The Seven Bishops* (a), and is confirmed in *Rex v. Cator* (b). But because such evidence is insufficient, it by no means follows that it is inadmissible in confirmation of other evidence. [Coleridge J. Can there be any difference between evidence offered absolutely, and in confirmation?] It is submitted there is. Suppose the question were, whether a letter from India were written by a particular person. Evidence that he was in India at the date of the letter would not of itself be sufficient to fix him with having written the letter, but might be strong corroborative proof. Many other cases might be put, where evidence strong in confirmation would be quite insufficient *per se*. Several cases now establish, that the jury may compare documents already in evidence in a cause, and yet a verdict would hardly be allowed to stand, if founded on that comparison merely. The exclusion of comparison of hands is evidence of itself sufficient, and its admission as corroborative and additional evidence, would not only be according to analogy in other cases, but would secure all the advantages, and obviate all the inconveniences and dangers of this sort of proof. It would also go far to reconcile the decisions which are not uniform. Comparison by a witness was admitted in *Goodtitle v. Braham* (c), in confirmation of other evidence. It was rejected in *Rex v. Cator* (a), there being, at the time when it was tendered, no other evidence.

But whatever may be the law as to comparison of hands, in truth this is not a case of comparison of hands at all. The witness gives his opinion of the writing from a knowledge of it previously acquired, whether from documents in the cause or not is immaterial; all that is necessary is, that that knowledge should have been legitimately acquired. It was legitimately acquired.

It is not even true that the witness acquired his knowledge of *Stribling's* handwriting in the course of the trial. He had acquired it before the trial, and probably before he

(a) 3 State Tryals, p. 720. Ed. 1719. (b) 4 Esp. 117.  
 (c) 4 T. R. 497.

left London, or he would not have been brought down as a witness. He had also heard before the trial, whose hand it was of which he had acquired a knowledge. At the trial he first saw the person whose handwriting he had known before. But a witness may swear to the handwriting of a person whom he has never seen; *Harrington v. Fry* (a). But further, as to the objection that the witness's knowledge was acquired *post litem motam*, or after the commencement of the cause, and therefore he cannot use it, no authority is cited in support of such a qualification of the general rule. It is at variance with daily practice; for a knowledge of handwriting is daily admitted, though acquired from letters or documents written after the dispute or even the action begun, as well as from others; and the limitation proposed would not only be novel, but attended with obvious inconvenience. The objection arising from unfair selection of the specimens, has been already discussed; and if this objection exists and applies to the specimens, it does not to the signatures to the depositions. The witness's knowledge rests as much on these as on the specimens, till the other side shew that it is entirely derived from the specimens. If a witness spoke to a knowledge of handwriting from ten letters, as to five of which there was a doubt whether they were genuine or imitations, while the remaining five were clearly genuine, would his testimony be rejected if the adverse party put no further question? The difficulty as to collateral issues exists, as has been before remarked, in every case, even where the opinion of the witness is clearly admissible. It may be inconvenient to allow a witness to speak from documents which are to be verified by another witness. But as this witness swore that he heard *Stribling* acknowledge the signatures to be his, that objection does not arise in the present case. It can be no objection that the jury, as well as the witness, heard *Stribling's* authentication. [*Coleridge J.* If a witness is asked in chief, do you know the handwriting of *A. B.*, to

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(a) 1 R. & M. 90.



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which he replies yes, and if he is asked on cross-examination, whether he ever saw the party write, or have corresponded with him, and he answers no; has any other mode ever been admitted to prove the handwriting of a living party? It is conceded that no case can be cited on the subject. But it is submitted, that the principle of law is this, "the witness must appear to have had satisfactory means of knowledge." There might have been some reason for requiring that the witness should have seen the party write, but after the Courts have gone beyond this, and recognized a knowledge founded on the receipt of letters not even acted on, as in *Doe v. Wallinger* (a), why should letters be the only documents from which knowledge of handwriting is to be attained? Would not the rule of law be capricious and unreasonable if it admitted that a knowledge might be acquired from letters, notes, and scraps of paper, but denied that it might from bills, checks, bonds, wills, contracts, affidavits, and other solemn instruments, on which both the witness and the writer may have acted. Signatures, acknowledged on oath by the writer, in the presence of the witness, especially if evidence in the cause or produced by the adverse party, are a safer foundation for knowledge than even these, and much more so than letters. Besides, this is a new case, and the same objection might have been offered when a knowledge founded on letters was first introduced? Why should the Courts make distinctions, which it is difficult to say are founded in reason, or in any express decisions, of which there is no trace in any other system of law, and which are disregarded with advantage in common life?

*Cur. adv. vult.*

The Court differing in opinion, the judges in this term delivered their opinions separately.

COLERIDGE J.—This was a motion for a new trial, on the ground that evidence had been improperly rejected by

(a) Manning's Index, 131.

my brother *Vaughan*, under the following circumstances. The question in the cause was, the due execution of a will; and the three attesting witnesses were called. It was supposed that one of them, *Stribling*, was deceived in swearing to his own attestation; and that although he had attested a will for the testator, the document produced was not that will, but a forgery, and that the attestation was in truth a counterfeit. Upon cross-examination, two signatures, purporting to be his, and to have been subscribed to depositions made by him in proceedings relating to the same will in another court, and also sixteen or eighteen signatures, apparently his, pasted on a sheet of paste-board, were shewn to him, and he said he believed they were all of his handwriting. At the time he gave this evidence, another witness was in Court, and the cause, lasting to the second day, was called. He had never seen *Stribling* write, nor had any other means of acquiring a knowledge of the character of his handwriting, but from an examination of the signatures so produced. This he had made on the first day, and from this he stated, that he thought he had acquired a knowledge of the character of his handwriting; and he was asked whether he believed the attestation to the will to be the handwriting of *Stribling*. This was objected to, and on argument determined to be inadmissible. In my opinion, after much consideration, the evidence was properly rejected. The rule as to the proof of handwriting, when the witness has not seen the party write the document in question, may be stated generally thus: either the witness has seen the party write on some former occasion, or he has corresponded with him; and transactions have taken place between them upon the faith, that letters, purporting to have been written or signed by him, have been so written or signed. On either supposition, the witness is supposed to have received into his mind an impression not so much of the manner in which the writer has formed the letters in the particular instances, as of the general character of his handwriting; and he is called on to speak as to the writing in question, by a reference to the standard so formed in his mind. It

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is obvious that the weight of this evidence may vary in every conceivable degree; but the principle appears to be sound both in regard to the test of genuineness, and the acquiring the means of applying it. The test of genuineness ought to be the resemblance, not to the formation of the letters in some other specimen or specimens, but to the general character of the writing, which is impressed on it, as the involuntary and unconscious result of constitution, habit, or other permanent cause, and is therefore itself permanent. And we best acquire a knowledge of this character, by seeing the individual write at times when his manner of writing is not in question, or by engaging with him in correspondence, either supposition giving reason to believe that he writes at the time not constrainedly, but in his natural manner. Upon these grounds directly, as I conceive, although not on these alone, our law has not, during a long course of years, permitted handwriting to be proved by the immediate comparison by a witness, of the paper in dispute, with some other specimen proved to have been written by the supposed writer of the first. It is familiar to lawyers that many attempts have been made to introduce this mode of proof according to the practice of the civil and ecclesiastical law. One text writer, to whose opinions I shall always pay the greatest respect, (Mr. *Starkie*, I mean,) has given this mode of proof the sanction of his authority, as preferable on principle to our own (a). But after some uncertainty of decision, the attempts have finally failed. *The King v. Cator* (b), though a nisi prius decision, brings this matter very fully under review, and to the extent at least of what it rejected, has always since been considered as laying down the rule correctly. In my humble judgment, that ought not to be departed from. Assuming that no dispute exists as to the genuineness of the standard, or the fairness with which it has been selected, such a comparison leads to no inference as to the general character of the handwriting, the two specimens may be much alike, or very different; yet in the

(a) Treat. on Evid. ii. 375, 2d. ed.

(b) 4 Esp. 117.

former case they may proceed from different hands, in the latter from the same. But if the points, which I have just supposed to be conceded, be brought into question, other and most serious objections arise to this mode of proof. If the genuineness be disputed, a collateral issue is raised, and that upon every paper used as a standard; an issue, too, in which the proof may be exactly of the same nature as that used in the principal cause, namely, mere comparison; with the additional disadvantages, that the former standard is not produced, and that the opposing party can avail himself of no counter proof. It is easy to see, too, as has been well observed by Mr. *Starkie*, that this inquiry might lead to an endless series of issues, each more unsatisfactory than the preceding. If the *fairness* with which the standard has been selected, be disputed, this again must lead to a collateral inquiry, in which the parties meet on unequal terms if no notice be given, and none is required by our law, and which must tend to distract the jury if notice be given, and the discussion on the circumstances, under which each specimen was written, be fully gone into.

It must always be borne in mind, in considering the rule of the English law on this subject, that it has reference to a trial by jury, and that we have no provisions for limiting the standard of comparison, or regulating the manner of conducting the inquiry, both of which it seems have been found necessary, where such a mode of proof has been admitted. It will be found not at all irrelevant to the present inquiry to observe these provisions in the ecclesiastical and French laws; for they seem not only to fortify the rule of our law, constituted as our mode of trial now is, but by their apparent inadequacy, in many supposable cases, and in the case of the ecclesiastical law, by the alterations which it has been found expedient to introduce into the practice, to make us satisfied with its present constitution. From Oughton's *Ordo Judiciorum*, (a) *Titulus De Comparatione Literarum ad Probandum Manum Testatoris*,

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(a) *Titulus*, ccxxv. vol. i. p. 332, ed. 1728.

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sections 1, 2, 10, 11, it appears, that when the handwriting of a testator or other principal party were disputed, and the attesting witnesses were deceased before the suit commenced, or were not called, it was allowable to proceed by the comparison of other instruments. These instruments of comparison were required to be proved *by witnesses who saw them written*. It was for the judge to decide whether they were sufficiently proved, and then the comparison was made by sworn comparators, whom he appointed, to the number of four or six, *et senioribus procuratoribus et peritioribus in arte scribendi*. The provision that the witnesses must have seen the party write the documents, which were to form the standard of comparison, would in our law make any comparison unnecessary; and the act of comparing here, as in the French law also will appear to be the case, was considered not so much the function of a witness, as the exercise of skill in a particular act, by ministers of the Court, accredited by it; and it should seem, in the absence of conflicting evidence, conclusively deciding the point in question. This mode of viewing the matter does indeed relieve it from some of the inconveniences above pointed out; but it is obviously inapplicable to the trial by jury; and as the cause might turn entirely on the will or other instrument being signed by the testator, or other party alleged, it in effect left its decision not to the judge, but to the delegated comparators, who proceeded in his absence. *Oughton's* work was published in 1733; and, I apprehend, is considered to have faithfully represented the practice then prevailing. I have been at some pains to ascertain what the present practice is, and I find that that whole proceeding, which *Oughton* describes, has long been entirely obsolete. But that is not all. In 1813 a case of *Spear v. Bone* came before the delegates, between the next of kin and executors in a will. On the face of the will alterations appeared; and a third party, being the sole executor as it originally stood, intervened, and the allegation which he gave in raised the very question of comparison of handwriting, and the ad-

mission of this allegation was the matter in discussion before the delegates. I have been favoured by Dr. Nicholl with the printed papers of Dr. Arnold, one of the delegates, and his manuscript note of the arguments. The Court, after a very learned argument and much discussion, directed the allegation to be reformed; and I am enabled to state that the reformation was settled with the full concurrence of all the delegates. Dr. Arnold's paper book, which I have, contains the allegation as altered in his own handwriting. In 1816, the cause came on again, and the allegation stands reformed in the printed paper, as settled in manuscript, and that has ever since been considered the only proper form of pleading. The allegation originally alleged, that upon an accurate examination of the said will by *writing-engravers, and others accustomed accurately to examine the formation of the letters of different handwriting, from their general occupation of making engravings of handwriting, fac simile and otherwise*, and otherwise best able to judge accurately thereof, it manifestly appears that the words and letters of the alteration aforesaid are not of the handwriting of the person who wrote the will, but that the same, though in many respects very like the writing of the other parts of the will, bears the appearance of having been touched with the pen a second time, as if done by some one endeavouring to copy or imitate the handwriting of another person.

It was thus reformed. That upon an examination of the said will, it appears that the words and letters of the alteration aforesaid are not of the handwriting of the person who wrote the will, but are in a feigned handwriting, and that the same is well known to persons skilled in handwriting. From all this it appears, that although comparison of handwriting is still an admitted mode of proof in the ecclesiastical courts, yet they have found it expedient to contract rather than enlarge the limits of its admissibility, bringing their rule more and more near to that which has hitherto prevailed in the Courts of common law—a reason, as it seems

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to me, of no little weight against our admitting such a head of evidence into our practice.

The ecclesiastical law appears to have made no limitation as to the quality of the instruments, which might be made the foundation of the comparison, "*alia scripta quamvis omnino impertinentia ad causam institutam.*" The French law is more precise; it defines not only the persons who are to make the comparison, (sworn "*experts*," three in number, appointed by the Court, or agreed on by the parties,) but the writings to be submitted to them. In the Code de Procedure Civile, L. 2, sec. 200, are found the provisions on this latter point. The writings must either be of a public nature, such as signatures made before a notary or judge, or on papers written and signed in some public capacity; or if private papers, they must be admitted *in the cause* by the party to whom they are attributed to be of his own handwriting; a previous admission of them, or previous proof, will not make them admissible. These latter restrictions are evidently framed at once to secure the genuineness of the specimens, and to meet the inconvenience of contradictory testimony as to this point; but they do not tend to the production of writing in the most natural character, and in a great many cases put it in the power of the party to exclude such from the comparison. *Pothier*, indeed, in his *Traité de la Procedure Civile*, p. 1, c. 3, a. 1, s. 2, seems to consider private writings or signatures as practically forming no standard of comparison on this ground. It is obvious in how many cases it would be impossible to produce writings of an individual answering to the description here given of public writings. I have been thus (I fear tediously) minute in stating the general rule, and the principles on which I conceive it now rests, and I think it unnecessary to cite any authorities in support of it, because no question is now made whether that rule exists, or is well founded; but it is contended that the facts of the present case fall within it. It is not denied, that immediate comparison is inadmissible, or that the witness must speak

from a knowledge of the general character of the handwriting; but it is asserted that here there was no such comparison, and the evidence tendered was founded on such knowledge. In order to determine this, it was necessary to have the rule and the principle of the rule distinctly in view; and it was desirable to see whether it rested on a sound foundation. Disregarding extreme cases, from which no inference can be safely drawn, and bearing in mind the mode of trial, with reference to which it has been framed, I confess I have no desire to see the rule altered or narrowed, nor am I disposed to take any case out of it, on account of a merely colourable difference in the facts, if they still remain within the principle.

Now in the present case it must be conceded, that the witness had not acquired his knowledge of the character of the handwriting, whatever it was, in either of the ordinary modes. He had studied certain signatures, selected by one party, and had acquired an impression of some general character pervading the whole; he had heard it proved that those were written by the witness *Stribling*, and from those materials he was to speak. It is asked how does this differ from the case of knowledge acquired in the course of a correspondence, where the standard rests equally on the assumption that the letters are written by the party whose they purport to be. With respect to the *assumption*, there will be a fitter place to point out the distinction, but I answer *here*, that the two cases differ in that which is *essential* in the undesignedness of the one, the fact that the letters are written in the course of business, without reference to their serving as aids for a collateral purpose, in some future unknown cause, and in the selection which is made in the other by the party to the cause, who seeks to produce them for a particular purpose. I have, therefore, no reasonable assurance, that the witness has the materials for ascertaining the *general* character of the handwriting, which is the knowledge to be acquired, and the facts are in this respect similar in principle to those of *Stranger v.*

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*Searle* (a), where Lord *Kenyon* would not allow a witness to speak from the knowledge which he had acquired, even by seeing the party write several times previously to the trial, because it was done for the avowed purpose of shewing, as he alleged, his true manner of writing. Those were in truth selected specimens, though beyond all doubt genuine; but they could not be safely trusted to as giving the general character of the handwriting.

But this is not all. No fraud is imputed in the present case; but I cannot forget that we are called on to lay down a rule applicable to all civil and criminal cases; and I ought to be careful therefore that I do not so lay it down as to open a door to fraud of the most fatal kind. In the present instance the writer himself admitted the signatures to be his; but that was only one mode of proof. It cannot be contended that the case would have been altered in principle if a third person had proved them, or if they had purported to be the signatures of the testator or of the party in the cause, and so necessarily proved by witnesses other than the supposed writer. If such evidence be good for any, it is good for all purposes. If it be receivable in confirmation of other testimony, it is receivable alone. If to disprove handwriting, it is equally so to prove it; and a conviction of forgery might pass on the opinion which a single witness might form, founded solely on the examination of signatures or a single signature, presented to him the night before by a prosecutor, who need not be called as a witness on the trial, to explain when and where such specimen had been procured, or from how many selected;—the prisoner, on the other hand, being wholly unprepared to enter into this explanation. It is no answer to this to say that a similar result might follow upon the evidence of a witness who had seen the prisoner write his name but once. That is an extreme case, upon a *principle unobjectionable in itself*; for no one can deny that the seeing a party write is at least one correct mode of acquiring a knowledge of his handwriting. Here the *danger is in the*

*principle itself* that selected specimens may be made the standard from which the witness is to judge.

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Furthermore, as the admissibility of this species of proof cannot depend on the fact of the signatures having been proved by the admission of the writer himself, I would ask, what course is to be pursued where the writing which is to form the standard is itself disputed. Is the counter-evidence to be received at once as to this point, and the opinion of the jury to be taken on the preliminary and collateral issues, before the evidence is heard as to the principal document? or is that to be gone into after the *prima facie* proof on the collateral issues, and to be received, subject to being entirely displaced by the answer on the other side? or, lastly, is the judge to decide this question of fact? I believe it is impossible to answer this question without either introducing a most inconvenient novelty in our procedure at *nisi prius*, or involving the jury in a complication of issues, from which it is too much to expect that they should escape safely.

Again, and connected with this last remark, I had understood that papers could not be submitted even to the jury for the purpose of comparison, except they were evidence on the issue then in course of trial before them. This was so decided by this Court in *Doe v. Newton (a)*, in affirmance of some previous decisions. But in the present case the documents were not evidence in the principal cause, yet they must have been submitted to the jury, who, before they listened to the evidence of the witness as to the attestation to the will, must have been required to decide in their own minds the collateral issue raised on every signature, whether it was that of *Stribling* or no. It will be asked whether, when the witness speaks from knowledge acquired in the course of correspondence, the jury must not also decide in their own minds whether the assumption be a just one, that the letters purporting to be written by

(a) 1 N. &amp; P. 1.

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the individual were in fact written by him? The answer is, that although if it were shewn to the jury that the witness was mistaken in the supposition he had made, his evidence must undoubtedly fall to the ground; yet the law makes it in the first instance a presumption that the letters of a correspondence carried on in the ordinary course of business, where the acts done on the faith of it are ratified by the parties, are written or signed by those whose signatures they purport to bear. And this, in the absence of all design or selection, is a reasonable presumption. The whole, too, depends on the same witness, and no more embarrassment therefore is created to the jury than where the witness says he has seen the party write; in which case they must also determine whether they believe that preliminary statement, before they consider the weight of his evidence as to the particular document. This assumption, no doubt, may sometimes proceed on a mistake; but so may the most direct evidence on handwriting. There is nothing so difficult to put beyond question as the fact that a particular instrument was signed by a particular person. In *Eagleton and Coventry v. Kingston* (a), Lord Eldon states the rule of evidence as to handwriting, when he first came into Westminster Hall, with great minuteness, and limits it even more narrowly than my argument requires. But he mentions a remarkable instance as regarded himself of the uncertainty of testimony to this point. A deed was produced at a trial, on which much doubt was thrown as a discreditable transaction. The solicitor was a very respectable man, and was confident in the character of his attesting witnesses. One of them purported to be Lord Eldon himself, and the solicitor, who had referred to his signature to pleadings, had no doubt of its authenticity. Yet Lord Eldon had never attested a deed in his life.

In a matter so open to mistake and fraud, and where the consequences are so serious, I have no desire to widen the

(a) 8 Ves. jun. 473.

door of admission. Is there then any real distinction either in principle or consequences between the facts now before us and one of direct comparison? If, instead of two days, the trial had lasted one,—if, instead of an examination of the signatures on the first day and out of Court, the witness had only seen them in Court, and immediately before he was shewn the will,—would not this have been clearly a case of direct comparison, however the question had been framed or the answer worded? And can it be affirmed that the alterations last stated would have in any respect differed the character of the evidence? Do they remove any one of the objections which have prevailed to exclude direct comparison from our rule of evidence?

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Upon the grounds therefore that our rule is a sound one, and well established both in what it admits and what it rejects, sound in principle, and convenient with reference to the mode of trial to which it is to be applied, and that the present facts are substantially within the latter branch of the rule, I am of opinion that the learned judge rightly rejected the evidence tendered. I could have wished to have examined in detail the decisions bearing upon the question, but the importance of the subject, and the difference of opinion which exists in the Court, have induced me (I hope excusably) to examine the principle so much in detail, that I must forbear; and I do so the more readily, because I have no doubt that that part of the argument will be thoroughly illustrated by another member of the Court. I will say this only, that I am not aware of any case of now recognized authority which lays down any *principle* conflicting with those on which I have relied.

I will only add, that I do not feel pressed by the case of ancient writings, in which a direct comparison is admitted. First, I observe that if that proves any thing, it proves *more* than is now contended for; for direct comparison of modern documents is not now insisted on. But, in truth, as to ancient documents, the necessity of the case and the difference of circumstances, have introduced a different

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*rule of evidence.* You cannot call a witness who has seen the party write or corresponded with him. Nor is there much danger in resorting to comparison of an unfair selection of specimens. Further, it is obvious to remark, that in ancient documents it does often become a pure question of skill,—the character of the handwriting varying with the age, and the discrimination of it to be materially assisted by antiquarian studies. This may have naturally assisted in opening the way for the admission of this evidence, even in cases where skill of that particular kind is not necessary.

With real diffidence therefore as to the soundness of my judgment, but having formed it with much consideration, I think this rule ought to be discharged.

WILLIAMS J.—This was an action of ejectment to try the validity of a will; and upon the trial, one of the subscribing witnesses (*A.*) to the will was called to prove the due execution by the testator and his own attestation. The fact of his attestation being in behalf of the lessor of the plaintiff, disputed, and in consequence the genuineness of his (*A.*'s) signature brought into question, he was asked, upon cross-examination, whether certain signatures, to the number of twenty, (then shewn to him,) were of his (*A.*'s) handwriting; and they were by him stated so to be. The cause having been adjourned, these signatures were shewn to a second witness (*B.*), professing to have knowledge and skill in handwriting, who was directed carefully to examine the same, and upon the day following *B.* was called on behalf of the plaintiff, and was asked whether, from such examination, he had acquired a knowledge of the character of *A.*'s writing; and in answer, he said he had; and thereupon the following question was proposed to him,—whether, from the knowledge he had so acquired, he believed the signature of the attestation in question to be *A.*'s handwriting. Upon objection, the learned judge considered the evidence to be inadmissible, and it was rejected accord-

ingly. And upon a motion for a new trial, the propriety of that decision is brought under our consideration. And the question (important as it is, being connected with principles and practice regulating the admissibility of evidence,) seems mainly to be reduced to this point,—whether the knowledge which the witness professed to have was acquired by means prohibited by any known and established rule of law. It is quite superfluous to remark, that with the admissibility only is our concern. How far the evidence, if received, might have answered the intended object or fallen short of it,—with what observations it might or ought to have been accompanied,—I think it wholly unnecessary to inquire.

Now, that proof of handwriting is to be submitted to the consideration of the jury, like every other species of proof, I apprehend to be clear. From the highest degree of certainty, carrying with it perfect assurance and conviction, to the lowest degree of probability, upon which it is found to be unsafe to act, it may be and constantly is submitted. From continued and habitual inspection, or correspondence, or both, carried on till the trial itself, down to a single instance or knowledge, twenty years' old evidence may be received. I allude of course to the case, *Garrells v. Alexander* (a), where the execution of a bail-bond was held by Lord *Kenyon* to furnish means of knowledge. The authority of this case is indeed questioned by Lord *Eldon* upon another point, *because the witness would not go so far as to express any belief*; but as to the competency of a witness founding himself upon a single instance (b), we have his (Lord *Eldon's*) important and prevailing testimony. In the case of *Eagleton and another v. Coventry* (c), he thus expresses himself:—"You call a witness, and ask whether he had ever seen a party write: if he had, whether more or less frequently: if ever, that was enough to introduce the question, whether he believed the

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(a) 4 Esp. 37.

(c) 8 Ves. 473.

(b) *Burr v. Harper*, Holt's Rep. 420.

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paper to be his handwriting; if he answered yes, that was enough to go to the jury. You might call a witness who had not seen the party write for twenty years, and if he said he believed it to be the writing of the person, that evidence might go to the jury, but to be affected by the rest of the evidence, *as it is the nature of all evidence to be more or less convincing.*"

The observations above applied to knowledge gained by seeing a party write, must, I presume, be admitted to be applicable to knowledge gained from correspondence "acted upon," as the phrase has been, or, in other words, where there has been something to shew that it was really the writing of the party whom on the face of the letter it purports to be, subject to the qualification of Lord *Eldon*, which seems to be the criterion and to decide the question in each case. I am aware of no rule attempting to prescribe the quantity of knowledge which is requisite to enable a witness to speak to his belief;—what degree of freshness and recency in the correspondence to admit, or what antiquity to exclude, may (as the reason of the thing would induce me to expect) in vain be looked for. To the jury it must go, in the language of Lord *Eldon*, from the highest to the lowest. That the evidence therefore ought not to have been rejected, from the slender and inefficient nature of it, would not be contended: indeed, the very objection implies the contrary. The question therefore comes, as I stated at the outset, to the means by which the knowledge of the witness was acquired; and the objection is twofold; first, that it was acquired merely by the comparison of writing, and next, that at all events it was not acquired by either of the legitimate and recognised modes already referred to,—having seen the party write or corresponded with him.

As to the first, if the object is to be understood in the sense in which it has been from the time of the reversal (a)

(a) *Roe v. Rursbys*, 2 Star. 374; *Doe v. Tarver*, 1 R. & M. 141.

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of *A. Sidney's* attainder, which recites that the jury were directed to believe a certain paper to be the prisoner's, *from comparing it with other writings of his*, it is to be observed that it does not apply. Whether what was done be *equivalent*, is another question. The witness not having before compared the disputed signature with those admitted, but having acquired *some* knowledge by an attentive examination of them (the admitted ones) is first called upon in Court to inspect the questionable signature and give an opinion from such knowledge, and not from comparison by juxta-position of the signatures themselves. I beg to be understood as by no means intimating an opinion, that the rule which has obtained with respect to the comparison of handwriting should be disturbed, because upon examination it may appear to depend upon reasons not perfectly satisfactory. It seems to me that the evidence, so far as this objection is concerned, was admissible, because it was not the comparison of handwriting in the proper and ordinary sense of the term. To reject it, because what was equivalent to a comparison of handwriting took place, would go far, so far as the reason of the thing is concerned, towards disturbing the rule altogether, and letting in a comparison of handwriting as a medium of proof in all cases whatsoever, or excluding in a part degree all possibility of proof. What is to be said where the means of knowledge are derived from a bygone correspondence of considerable standing? What is it but comparing a distant and (in proportion to the length of time) faint image in the mind with the writing in question? I will only refer to the observations of Mr. *Starkie* (a) in his learned and valuable work, and those of Mr. *Phillips* (b) on the same subject. In a still earlier work, which the author used to say was more used by other writers than noticed, I mean a treatise upon the law of evidence appended to his edition of *Pothier*, by the late *W. D. Evans*, I find the following remarks, with others to the like effect.

(a) 2 Stark. Ev. 375, 2nd ed.

(b) 1 Phil. 483—494, 7th ed.

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" But where in point of reason is the objection to proof by comparison of hands, as founded upon inspection at the trial? What is the common evidence of knowledge, but an act of comparison of the object presented to the sight, with the object imprinted on the mind with the image and copy of the supposed reality? And when the comparison is made not with this fallacious copy, but with an undisputed original, and that too by a person of skill and experience, it is deemed not only a matter of technical caution, but an essential point of constitutional liberty to reject the assistance which it may be likely to afford." (a) I would repeat, that I doubt the propriety (not to say the right) of this Court upon plausible objections merely to disturb long-established practice and usage, in a case too of such frequent occurrence; but for the sake of the rule itself, and its security, I would confine it to the case of actual collation and comparison, which, when done in Court and before the jury, is supposed to be attended with inconvenience as to them. Unless the jury could read they would be unable to judge of the supposed resemblance; which furnishes a reason against such comparison altogether (b).

The recency of the information and acquaintance acquired in this case, can surely not operate as a valid objection. Suppose a person to have seen another sign or write a paper, or to have received one or more letters from him, but from length of time his general recollection was become so faint and indistinct that he should be unable to form an opinion, might he not peruse and study those authentic documents, if in his possession, to improve and refresh his knowledge, before he was called upon to give evidence respecting the writing of that person by whom such paper or letters, as above supposed, were confessedly written? I apprehend he certainly might. Up to the extent of the above observations, if not beyond them, the very point has been decided in the case of *Burr v. Harper* (b). In truth,

(a) Pothier's Appendix, 185, Evans.

(b) *Burr v. Harper*, Holt's Rep. 420.

the reference was not to revive and refresh, but to *gain* knowledge. And would such perusal be admissible if made a week or a month before the trial, but not so if made an hour before the witness went into Court to give his opinion upon the particular writing in question ?

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The case of ancient documents, it must of course be admitted, depends upon a ground distinct from our present inquiry—necessity. Some considerations, however, not wholly foreign perhaps from our present subject, may be collected from that head of evidence. That an attentive observation of writing assumed to be that of a particular person to constitute knowledge of his character so as to enable a person to give evidence of opinion and belief, is allowable, must, I presume, be considered as placed beyond a doubt. In *Brookbard v. Woodley* (a), Mr. J. Yates is said to have decided the contrary ; but Lord *Hardwicke's* authority (b) is expressly in favour of it, and so are the more recent decisions without exception. Whether by studying the assumed handwriting the witness should have acquired a knowledge of the handwriting, and *then* apply himself to the writing to be proved, or whether an actual comparison may be made, and *so* a foundation of knowledge made, does not seem equally clear. Mr. Justice *Holroyd*, than whom a more sound and safe authority cannot be quoted, was of the former opinion ; the latter course was pursued by Lord *Tenterden*, in *Sparrow v. Farrant* (c) and *Doe v. Turner* (d), who, at the same time, quoted a case before Mr. Justice *Lawrence* to the same effect. But whichever course be the correct one, I apprehend it to be clear, that no objection can be made from the time at which the information is obtained upon which the proof is given. In the two last cited cases, it is obvious that the witness was called upon to pronounce an opinion in the midst of the trial, without any preparation before.

(a) Peake, 20, n.

(c) 2 Stark. 375.

(b) Bull. N. P. 236.

(d) 1 R. & M. 141.

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I come now to consider, whether the witness in this case had *any* legitimate means of knowledge to authorize the question, the answer to which was rejected. It has been said, that the specimens selected may have been garbled and fallacious, "seeing the purpose of the party producing them, and therefore not exhibiting a fair specimen of the general character of the handwriting." And this, it will be recollected, is the second usual objection to the admissibility of the comparison of handwriting. The first having been before noticed, I have before endeavoured to explain why, in my opinion, the objection arising from such comparison was not applicable in fact to this case. Supposing, however, for the present purpose, that it is, I cannot perceive how it can be affirmed that this was a partial selection by those who wished to use the papers. The selection was not depending upon their power merely. The whole was subject to the answer of the witness. The papers produced might all have been admitted to be of his handwriting, or one-half, or any other portion of them, or all might have been denied. When the papers were so admitted, was there not then *some* proof that they were of the witness's handwriting? And if so, how can the case differ in kind, though it may in amount or degree of proof, from the perusal or reperusal of a couple of letters written, the one ten, the other five, years before? Why may the witness give an opinion of any person's handwriting from a study of such letters? Because the writer has in some manner authenticated them to be his. Why might the witness have been asked the proposed question in this instance? Because the witness had sworn that the papers were of his handwriting. In each case it is from the *perusal* of papers (and *perusal only*) that the knowledge is acquired. In each case there is some proof that the papers to be perused in order to form a judgment, are those of the parties respectively, respecting whose handwriting in the particular case the question and inquiry arise. To which of the two species of proof preference

should be given, is a matter upon which opinions may vary, and foreign to the present purpose. The only question, as it seems to me, is, whether in both cases there is not *some*.

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When speaking of the facts necessary to introduce knowledge of handwriting, not from actual inspection, but from correspondence, I adverted to an expression in frequent use, and which indeed has almost gone into the currency of a proverb upon this subject;—that the letter or letters “*must have been acted upon*.” If, however, by this expression it be meant to imply that any business must be transacted, or in any sense of the words *act done*, the observation is without foundation, for nothing of the sort is necessary. This was expressly decided by Mr. Justice *Holroyd*, to the value and weight of whose opinion I have given my unnecessary, though sincere, testimonial. Any thing, I presume, from which the identity of the writer is established, may suffice. If then from such proof, whence a reasonable inference may arise, that the letter or signature is by such or such a person, an opinion of his handwriting may be given, the question recurs whether there be not *some* foundation for opinion where the party has upon his oath declared, that the papers perused by the witness were written by himself. That no person has hitherto been allowed to speak of his belief of handwriting, except he has acquired his knowledge by one or other of the prevalent methods (having seen the party write or received writing from him) may doubtless be true; but it is, I fear, but an imperfect solution of the present difficulty. May not the answer be, that the case is new? In truth, has it ever arisen before? If not, we are called upon, as in the various and ever varying combination of human affairs continually does and must occur, to apply, as well as we can, the principles and analogies having the nearest and most direct affinity to the subject to this fresh question.

It is hardly necessary for me to observe, that the view which I have taken of this case secures me from touching

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at all upon the authority of the recent decision of this Court in *Doe v. Newton* (a) and of the Exchequer in *Griffith v. Williams* (b). I quite accede to the propriety of rejecting the evidence tendered in the former case, and of the line of distinction established in the latter. It is still less necessary after what has been observed; but at the hazard of repetition, I am desirous to avoid the possibility of all misconception to say, that I have throughout assumed the rule with respect to the comparison of handwriting to be perfectly fixed and established. Whether, after all that has been said and written against the comparison of handwriting, opinion and belief are not *virtually* formed in a great variety of instances upon comparison, and that not of the most satisfactory kind, is another question. The rule I find absolutely settled, and that is enough for me. If by argument, or upon further consideration, I could have been satisfied that the rule would have been infringed upon by the admission of the evidence, my task would have been easy, and a conclusion speedily arrived at. It is precisely because, as it seems to me, the admission of this evidence would have been according to and in pursuance of the rule, I think the rejection improper.

Whether the objection was worth making where the value of the evidence is considered, I will not undertake to say; but the question has arisen, and must be disposed of. If it should be thought so, this only resembles another instance not unconnected with it (c), the opinion of an expert person upon the genuineness of handwriting; where the difference of opinion upon the admissibility of the evidence has been much greater than the importance which, by universal consent, ought to be attributed to it if received.

That the present case is, in its precise circumstances, new, must, I presume, be admitted. Such an occurrence

(a) 1 N. & P. 1.

Appen. 130; *Rex v. Cator*, 4 Esp.

(b) 1 C. & J. 47.

117; *Gurney v. Langland*, 5 B.(c) *Goodtitle v. Braham*, 4 T.

& A. 330.

R. 497; *Carey v. Pitt*, Peake's

however must, perhaps, from the nature of things, be deemed unavoidable. The saying of Lord *Mansfield* (a), when pressed by some citations from them, "That he did not sit to receive rules of evidence from *Siderfin* and *Keble*," may possibly be considered as rather bold, but I have no doubt that it was a true one of Lord *Kenyon* (b), in deciding a fresh point of evidence, "That it is the business of courts of justice to apply the general principles of the law to new cases as they arise."

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Upon the whole, with sincere respect for the contrary opinions, I think the evidence was improperly rejected, and that there ought to be a new trial.

PATTESON J.—In this case one of the attesting witnesses to a will having been called, and having sworn to the publication, and his own signature, twenty documents were put into his hand in cross-examination, all of which he swore to have his signature. None of these documents were used as evidence in the cause, nor could have been, unless with reference to the handwriting of this witness, or as regards two of them, for the purpose of contradiction, those being the witness's depositions in the Ecclesiastical Court. The twenty documents had been previously shewn to an inspector from the Bank of England, and after the examination of the witness, were again submitted to the same person. The cause was not concluded on that day, and the next day the inspector was placed in the witness box for the purpose of swearing to his belief that the signature, as attesting witness to the will, was not the handwriting of the witness who had been examined the day before. He was asked how he had acquired a knowledge of the handwriting of the witness, when he stated it to be in the manner above mentioned, and none other. The learned judge rejected his testimony; and the question is, whether he was right in so doing?

All evidence of handwriting, except where the witness

(a) In *Lowe v. Jolliffe*, 1 W. Bl. 366. (b) *Keeling v. Ball*, Peake's App. 88.

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sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous knowledge. That knowledge may have been acquired either by seeing the party write, in which case it will be stronger or weaker, according to the number of times, and the periods, and other circumstances, under which the witness has seen the party write, but it will be sufficient knowledge to admit the evidence of the witness, (however little weight may be attached to it in such cases,) even if he has seen him write but once, and then merely signing his surname; (*Garrells v. Alexander (a)*, *Powell v. Ford (b)*, *Lewis v. Sapio (c)*); or the knowledge may have been acquired by the witness having seen letters or other documents, professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them, by written answers producing further correspondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness, which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party; *Lord Ferrers v. Shirley (d)*, *Carey v. Pitt (e)*, *Tharpe v. Gisburne (f)*, *Harrington v. Fry (g)*. Evidence of the identity of the party being of course added *aliunde*, if the witness be not personally acquainted with him. These are the only modes of acquiring a knowledge of handwriting, which have hitherto, as far as I have been able to discover in our law, been considered sufficient to entitle a witness to speak as to his belief in a question of handwriting. In

(a) 4 Esp. 37.

(b) 2 Stark. 164.

(c) 1 M. & M. 34.

(d) Bull. N.P. 236; Fitz. 195.

(e) Peake's App. Cases, 130.

(f) 2 C. & P. 21.

(g) Ry. & M. 90.

both, the witness acquires his knowledge by his own observation upon facts coming under his own eye, and as to which he does not rely on the information of others; and the knowledge is usually, and especially in the latter mode, acquired incidentally, and, if I may so say, unintentionally, without reference to any particular object, person, or document. A third mode is now sought to be introduced, namely, by satisfying the witness, by some information or evidence, that a number of papers are in the handwriting of the party, and then desiring him to study those papers, so as to acquire a knowledge of the handwriting, and fix an exemplar in his mind, and afterwards putting into his hand the writing in question, and asking his belief respecting it; or by merely putting certain papers into the witness's hands, without telling him who wrote them, and desiring him to study them, and acquire a knowledge of the handwriting, and afterwards shewing him the writing in question, and asking his belief whether they are written by the same person, and calling evidence to prove to the jury that the former are the handwriting of the party, which, perhaps, may be considered as the same process in effect, expressed in other words. The very foundation of this mode is the establishment of the fact, that the papers, from studying which the witness is to acquire his knowledge, are the handwriting of the party. Now, that fact must be established either by the acknowledgment of the party, or by the information of third persons; assuming the witness to be the only person to be satisfied of the fact, it is obvious that the acknowledgment of the party, if the witness be called to affirm the handwriting, would be a most unsafe ground on which to act, and was so considered by Lord Kenyon, in *Stranger v. Searle*(a); and if the witness be called to disaffirm the handwriting, the acknowledgment of the party, unless he be a party to the suit, ought not to bind the litigants; and if he be a party to the suit, it may fairly be urged that the case would come within the second mode of acquiring knowledge

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(a) 1 Esp. 14.

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above suggested, namely, by a direct communication with the party. The other modes of satisfying the witness, viz. by the information of third persons, is equally open to objection, as it must be given behind the back of one or both of the litigant parties, and would obviously be most unsafe and unfair. The jury, therefore, must be satisfied of the fact. Now that must be by evidence, and will raise a number of collateral issues foreign to those on the record, and for which one of the litigants must of necessity be wholly unprepared, in addition to the danger of unfair selection by the other litigant who produces the papers. I need hardly advert to the great inconvenience and waste of time which will be incurred by such a wide range of collateral matter, nor to the observation, that the proof of the papers in those collateral issues might be by calling a witness who had acquired his knowledge of the handwriting in the very same way, from other papers, which would equally require to be proved; and so it is obvious, that the same process as is now attempted might be repeated ad infinitum, and lead to no conclusion. But if the proof of the papers in those collateral issues be by calling witnesses who have acquired their knowledge of the handwriting by either of the two modes, which I consider to be the only legitimate modes, those witnesses must, from the nature of the evidence, be much more competent to form an opinion as to the handwriting really in question in the cause, than the witness whose evidence is proposed to be introduced by such a process. And, after all, when that evidence is introduced, what is it, but a comparison of handwriting? Now a direct comparison of handwriting by a *witness* has been, with the exception of one or two supposed cases, uniformly rejected; and it is only in very recent times that a *jury* has been allowed to institute such a direct comparison, and even that has been confined to a comparison between documents proved and given in evidence in the cause, being relevant to the issues raised on the record, and which, being before the jury, it is hardly possible to prevent a comparison being

instituted, *Griffith v. Williams*(a), *Solita v. Yarrow*(b), *Rex v. Morgan*(c), *Allport v. Meek*(d), *Bromage v. Rice*(e). One authority to the contrary is to be found in *Allesbrook v. Roach*(f). But this Court recently, in the case of *Doe v. Newton*(g), has expressly determined that documents irrelevant to the issues on the record shall not be received in evidence at the trial, in order to enable a *jury* to institute such a comparison, much less can it be permitted to introduce them in order to enable a *witness* to do so.

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I know that it is thought by many persons, that direct comparison of handwriting is more satisfactory than I am disposed to consider it. In a work of great merit, *Starkie on Evidence*, vol. ii. p. 375, there is this passage: "It cannot, however, be denied, that abstractedly, a witness is more likely to form a correct judgment as to the identity of handwriting, by comparing it critically and minutely with a fair and genuine specimen of the party's handwriting, than he would be able to make by comparing what he sees with the faint impression made, by having seen the party write but once, and then perhaps under circumstances which did not awaken his attention." I agree to that passage in its very words. Then the weakest possible degree of knowledge which can arise from seeing a person write, is contrasted with the strongest possible degree which can arise from a direct comparison; and it is assumed that the specimens are fair and satisfactorily proved, which I will venture to say they will not be in one case in an hundred. But generally I am of opinion, that the comparison, even of an admitted fair specimen with a disputed writing, is far from satisfactory. Nothing can be more fanciful than the opinions persons are apt to form from such comparison,—some dwelling on the general character, some on the peculiar turn of a particular letter, and other minute circumstances

(a) 1 C. & J. 47.

(e) 7 C. & P. 548.

(b) 1 M. & R. 113.

(f) 1 Esp. 351.

(c) 1 M. & R. 133, note.

(g) 1 N. & P. 1.

(d) 4 C. & P. 267.

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of similitude or discrepancy, which every man in his own experience must know may arise from the different pen or ink, or haste, or deliberation, with which the same person writes at different times. To my mind, I confess, the knowledge of the general character of any person's handwriting, which a witness has acquired incidentally and unintentionally, under no circumstances of bias or suspicion, is far more satisfactory than the most elaborate comparison of even an experienced person, called by one side or the other, with a particular object. I find no express authority that direct comparison of handwriting is admissible in evidence, but many to the contrary. It is, indeed, said, by *Pemberton J.* in the *Seven Bishops'* case (a), "That in every petty cause, where it depends upon comparison of hands, they used to bring some of the party's handwriting, which may be sworn to be the party's own hand, and then it is to be compared in Court with what is endeavoured to be proved, and upon comparing them together in Court, the jury may look upon it and see if it is right;"—and he was arguing against any such comparison in a criminal case. If such was the practice, it has long ceased to be so; and the distinction between civil and criminal cases, as to rules of evidence, is no longer recognized. However, on looking to the report of the *Seven Bishops'* case, it is plain that no question of direct comparison arose; the question really was, whether witnesses who had never seen the parties write, but had seen writings supposed to be theirs, were admissible? The Court constantly said that they were not, and compelled the crown to prove the writing by other evidence; and accordingly an admission by all the defendants of their signatures to the alleged libel was proved. So in *Algernone Sidney's* case (b), no evidence of direct comparison of handwriting was given, and some of the witnesses swore that they had seen him write. Yet in the bill for reversing his attainder, it is stated, that he was convicted by

(a) 4 St. Trials, 342.

(b) 3 St. Trials, 802.

illegal evidence of comparison; which, so far as it goes, shews that such comparison was not at that time considered to be legitimate evidence.

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Comparison of handwriting has, indeed, been allowed in the proof of very ancient documents, where, from lapse of time, no living person could have any knowledge of the handwriting from his own observation, as in *Roe v. Rawlings* (a), *Morewood v. Wood* (b), *Taylor v. Cook* (c), *Doe v. Tarver* (d); but this has been allowed from absolute necessity, and the impossibility of better evidence being adduced. Direct comparison by a witness was expressly rejected by Lord *Kenyon*, in *Stranger v. Searle* (e), and also in *Clermont v. Tullidge* (f); and it was conceded in argument at the bar in the present case, that the uniform practice in the Courts for many years has been not to receive such evidence. In the case of *Burr v. Harper* (g), *Dallas C. J.* allowed what I consider to have been comparison of handwriting, and I do not think that decision right; it was never brought under review, because the verdict was against the party in whose favour it was made. I do not, under these circumstances, feel that I am obliged by authorities to admit of any mode of acquiring a knowledge of handwriting, except the two above suggested; and for the reasons already stated, I am of opinion that no other mode ought to be introduced, and that the learned judge was right in rejecting the evidence.

LORD DENMAN C. J.—A person, whose name appears as an attesting witness to a will, is called by the defendant at the trial, and swears that he attested the will, and saw the testator execute. The plaintiff's case is, that the will was not genuine, imputing fraud, if not conspiracy, to some of the parties concerned. To this attesting witness he pro-

(a) 7 East, 279.

(b) 14 East, 327.

(c) 8 Price, 658.

(d) Ry. & M. 141.

(e) 1 Esp. 14.

(f) 4 C. & P. 1.

(g) Holt's C. N. P. 420.

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fesses not to impute perjury, nor participation in the fraud : his theory is, that the witness attested some paper, and believes the will produced to have been that paper ; but the defendant says, that the witness was herein deceived ; that the paper which he signed was not the will, though he thought so, and that the will produced, with his name, was never seen by him before. In connection with other facts, from which he draws this inference, he proves by the same witness many of the genuine signatures of that witness ; and then calls a second witness, who obtaining from these an acquaintance with the character of the attesting witness's handwriting, is to be called upon afterwards to pronounce an opinion whether the attestation to the will is in the same person's handwriting. That is, he is expected to give in substance the following testimony : " I have gained a knowledge of the handwriting of A., from examining all the proved signatures, and I am of opinion that the signature to the will is not of the same character of A.'s handwriting ;" from which, among other things, the jury were required to conclude, that the will was not in fact attested by A. The effect of this evidence is not under consideration. When the witness, with unimpeached character and unimpaired intellect, came to swear positively to facts, on which mistake was scarcely possible, and to that handwriting with which no living person could be so conversant as himself, one can hardly imagine any position of the cause, in which any matter of opinion could afford a formidable contradiction to his direct proof. In the present case, however, such a state of things doubtless existed, for the learned and able counsel for the defendant took the objection : and we are bound to consider whether as a matter of strict law the plaintiff had a right to lay before the jury the evidence that was witholden from them. In the first place, I think it was not contended at the bar, that evidence of opinion on this subject was not receivable, though in opposition to a positive statement of fact. And, indeed, however specious at first sight, such an argument could not be maintained a

moment. There is nothing binding in the most positive assertions of the most knowing witness; they may be untrue, from ill intention or mistake; and if untrue, the party interested should be allowed to offer evidence that they are so, which may consist of a variety of circumstances, including the character of handwriting. Suppose, *exempli gratia*, a man to have sworn that he saw a party sign and execute a bond, the evidence of all who were best acquainted with that party's writing, that the signature was not in their opinion his, would surely be admissible. Taking it then as clear that the undeniable peculiarities of this case do not preclude evidence of opinion as to the handwriting, the only question is, whether the witness called to pronounce one had sufficient materials for forming one, to be admissible for that purpose. And he appears to stand exactly in the same situation as he would have done if called to speak of the handwriting of a party to the suit, whether for or against the genuineness of the document. He may have been called for the plaintiff to prove the defendant's signature to a bill or bond. He did not see him sign it, nor has he ever seen him write: but this is confessedly immaterial, if he has had other adequate means of obtaining a knowledge of his handwriting. Such is the rule, as Mr. *Starkie* (a) understands it, not in terms warranted by the page of *Buller's Nisi Prius*, cited in his note, but fairly resulting from the practice. Within what narrow limits can the line be drawn? The letters, forming one side of a correspondence, do not prove the handwriting, because addressed to a particular person: that person's evidence may be requisite to shew that A. had in some way recognized the letters bearing A.'s signature, and was therefore, probably, the individual who wrote them; but this is quite different from a knowledge of the handwriting, whether they proceeded from A., or from any other. The clerk, who constantly read the letters, the broker who was ever consulted upon them, is as competent to judge whether another signature is that of the

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(a) 2 Stark. on Evid. 372.

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writer of the letters, as the merchant to whom they were addressed. The servant, who has habitually carried letters addressed by me to others, has an opportunity of obtaining a knowledge of my writing, though he never saw me write, or received a letter from me. In a *nisi prius* case, *Smith v. Sainsbury* (a), it was necessary to prove the handwriting of an attesting witness. The defendant's attorney was sworn, and said that he believed he knew the handwriting, for he had seen the same signature to an affidavit used by the plaintiff's attorney at an earlier stage of the cause. *Parke J.* overruled an objection to the evidence, observing, "If it was mere comparison of hands, it would not do; but it is not so; the witness says he took notice of the signature, and in his mind formed an opinion, which enabled him to come to his belief; I have no doubt that it is evidence." In ancient documents knowledge of an officer's handwriting is frequently obtained by an observation of his signature to papers which he would be called upon officially to sign: and a witness, speaking from that knowledge, may give an opinion whether any particular writing was made by the same person. The process is, therefore, recognized as one which may enable one man to form a competent opinion as to the handwriting of another.

Pausing here for a moment, I must fairly say, that I think the syllogism complete. Opinion is evidence of handwriting, where it is founded on knowledge obtained from inspection of documents proved to be written by the same party—the opinion tendered here was founded on such knowledge. If, however, any rule excluding such evidence had been promulgated by competent authority, I should at once have yielded my own views. I find no such rule laid down; nor can I deduce one from the mere circumstance, that opinion of handwriting has hitherto been formed on other means of forming one. The consequences of excluding knowledge so obtained may be in the highest degree injurious to the interests of truth. Suppose for ex-

(a) 5 C. & P. 196.

ample, that instead of Lord *Eldon*, some person of very inferior rank had appeared to be the attesting witness; that he was dead at the time of the trial; that conspirators, who forged the deed, had been intirely unacquainted with his mode of writing. The production of the instrument, and a perjured oath that he in fact attested, would set up the forgery. A clear knowledge of the character of this man's writing would at once defeat the fraud. But the means of obtaining such knowledge might be unattainable from any one who had either seen him write, or had held any correspondence with him. From documents, satisfactorily proved to have been written by the witness, possibly never heard of till the eve of the trial, complete demonstration might be obtained. Similar evidence, proving the genuineness of a disputed attestation, might save the life of a person accused of forgery. I adopt, therefore, the rule in Mr. *Starkie's* work, which I think as important as it is intelligible. No single authority cited in opposition to the rule was applicable to this point, or rather was favourable to the defendant's argument. *Ferrers v. Shirley* (a), if it proves any thing, is against him; for there the Court would have received evidence of a witness's opinion on the handwriting to an attestation, if the papers, on which the opinion was founded, had been traced to the attesting witness. It was the proof of identity that failed; *Stranger v. Searle* (b) was before Lord *Kenyon* in 1793. The defence to an action brought on the acceptance of a bill, was forgery of the supposed acceptor's name. The usual evidence of belief having been given by the plaintiff, the defendant produced other writings as his, for the purpose of comparing them with the bill sued on. The objection here taken was a preliminary one; that "it did not appear which was the real handwriting of the defendant, both being proved by witnesses, and that it was, besides, judging from a comparison of hands." The reporter says, "Lord *Kenyon* ruled, that the witness should not be allowed to decide on such comparison of hands." This ruling appears correct on both grounds,

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(a) Fitzg. 195.

(b) 1 Esp. 14.

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but it does not touch our present argument. For here the other documents were proved genuine by the witness himself, and the inference was not sought to be drawn from comparing the papers, but from enabling another witness to obtain a knowledge of the handwriting from the papers so proved, and then apply it to the paper in dispute. There was, however, in that case a direct tender of evidence of opinion so formed ; for the defendant's counsel there observed, " that the witness had seen the defendant write several times ;" but on his adding, that this was " when the defendant had written his name, for the purpose of shewing the witness his manner of writing," Lord *Kenyon* rejected the evidence, " as the defendant might write differently from his common mode of writing, through design." This objection scarcely required the acuteness of that great judge, but is quite foreign to the present discussion. In *Allesbrook v. Roach* (a) a similar defence was made. After the usual evidence of belief, and apparently for the purpose of strengthening it, " another witness was called, who had in his possession five bills of the defendant's, which had been proved under his commission. Upon being shewn the bill upon which the action was brought, he said he did not think the acceptance was the defendant's writing." This appears precisely similar to the evidence rejected in the present instance. The reporter adds, " Upon comparing these with the acceptance, they were evidently dissimilar." He does not say by whom the comparison was made ; we must take this, I think, to have been done by consent. Then on the defendant's part, a witness, who had seen defendant write, declared his belief that the acceptance was not his writing. Then the counsel *offered to the jury* several other bills, admitted to be of the defendant's writing, and desired the jury to compare them—a course which was objected to, but allowed by Lord *Kenyon*. This case surely does not assist the plaintiff's objection here, since the course there passed unquestioned, which was here declared inadmissible, and the opinion of the learned judge, that the jury might com-

(a) 1 Esp. 351.

pare writings, does not make out that he would have excluded opinion founded on other documents proved aliunde to be genuine. The next case in order of time, which never fails to be mentioned when evidence of handwriting is debated, *Goodtitle d. Revett v. Braham* (a), furnishes, however, by no means so valuable an authority as we might expect to find in a trial at bar. The questionable evidence there received was withdrawn by the Court from the attention of the jury. And shortly after, in *Carey v. Pitt* (b), Lord *Kenyon* expressly pronounced it inadmissible; *Rex v. Cator* (c) is in its circumstances very near the present case. And though only a *nisi prius* decision, I apprehend that it has always been considered good law. The defendant was tried for a libel said to be written in a feigned hand. A person from the post office, supposed to be skilful in the detection of forgeries, was asked to look at certain writings in the defendant's natural hand, and then at the libel, and give his opinion whether the libel was in the same writing. *Hotham B.*, after hearing a very extended argument, rejected the evidence. If this witness had been desired to look at those papers the day before, in order to gain acquaintance with the character of the writing, that case would have been identical with the present. Can this difference between the modes of questioning the witness make the evidence receivable in one case and not in the other? I apprehend that it may. The distinction is doubtless very subtle, and in practice the two operations of the mind will be likely to run into each other. But there is an essential difference between casting our eye at the same moment on two objects placed before us, in order to judge of their resemblance and acquiring familiarity with a certain character of handwriting, in order to judge afterwards whether a document bears that character. Mr. *Starkie* thinks the former a much more satisfactory method; but I cannot agree with his remark. An ingenious forgery might counterfeit every line and angle

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(a) 4 T. R. 497.

(b) Peake's App. 130.

(c) 4 Esp. 117.

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so correctly, that to a common eye no discrepancy should betray itself, and yet one who has an intimate knowledge of the individual might detect a striking difference in the general character of the handwriting, as twins may present no observable diversity to a stranger, and yet be distinguished at a glance by their parents. Besides, in taking a witness's opinion on such a point, an appeal seems to be made to his experience and skill, while the mere ocular comparison of two documents in juxta-position looks like a mechanical proceeding—a mere act of measurement. Whether these reasons may be thought satisfactory or not, there can be no doubt that in former times the law, while it daily acted on opinion derived from knowledge of the character, regarded comparison of hands as extremely dangerous. The legislature in 1 *Will. & Mary* (private, c. 7,) declared accordingly the attainder of a *Sidney* void as against law, because the “jury were directed to believe the writing his, by comparing it with other writings of his.” Mr. *Starkie* seems to think this recital incorrect, according to our present notion of comparison of hands; and so it certainly is, if the report of the trial in the *State Trials* is faithful. Whether it is or not, we have no means of deciding. *Jeffries* is charged with falsifying these reports in some instances, and it is extraordinary that his summing up omits all mention of *Sheppard*, the first of the three witnesses said to have spoken to the prisoner's writing on the trial. None of the numerous pamphlets, however, impute to the report any misrepresentations in this matter of law. On the other hand, when the act for reversing *Sidney's* attainder passed, the memory was green of the atrocious trial which produced it, and the foulness of the admitted proceedings rendered all exaggeration or mis-statement superfluous. But, at any rate, the act is a legislative declaration, sanctioned, as we must believe, by *Somers* and the other great lawyers then in office, that comparison of hands, in the sense in which they understood it, was not a legitimate mode of judging of handwriting. And though there

may be a mistake in supposing that course to have been pursued in *Sidney's* trial, no other sense can be assigned to the words of the statute, but that which Mr. *Starkie* states as the present meaning of comparison of hands, i. e. "an actual comparison of one writing with another, in order to ascertain whether both were written by the same person." Cases to this effect are collected in a note in *Starkie*, p. 374, though in the following page an extract is given from the chapter on Evidence in *Buller's Nisi Prius*, which speaks of proving the writing of one instrument by a comparison with others; and *Le Blanc J.* twice admitted a comparison of ancient documents (*a*), observing, that at that distance of time no better evidence could be obtained. Whether better or not, I will not undertake to determine; but, plainly, *Holroyd J.* (one of the most accurate lawyers and profound thinkers that ever sat on the bench) was certainly aware of a different mode of proceeding with ancient documents, and one more conformable with what appears to have been the ancient practice; for he, in the same note, appears to have ruled differently in such a case. A witness produced, who was able to swear, from his having examined several of such signatures, that he had obtained sufficient knowledge, was permitted to give an opinion with respect to handwriting *without an actual comparison*. The same note indeed refers to a most remarkable case of *Doe v. Tarver*, in which Lord *Tenterden* directed a person producing a paper bearing a steward's signature, to *compare it with other signatures* of the same steward in books belonging to the manor, and say upon oath whether he believed that the writings were by the same person; observing, that he remembered *Lawrence J.*, at Worcester, directing a Mr. *B. Price*, accidentally present, to compare a certain ancient writing with others, purporting to be written by the same person, and give his opinion on the identity of the writing. I presume that the same course was taken in *Roe v. Rawlings* (*a*). It does not appear, however, that any objection was made to this method of forming an opinion on the writing; nor can it be supposed that

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any party would be interested in preferring the one mode of proof to the other ; nor, indeed, is it quite clear in fact that the method prescribed by *Holroyd J.* was not adopted by the three other learned judges who have been named, and the comparison made with the idea in the witness's mind, not with the paper itself. Even if it was not, and supposing the direct comparison to be right, it would not follow that that method was wrong, since both may be proper and admissible ; and if it was not inadmissible, I am at a loss to discover any difference between that evidence and the evidence which has been excluded on the trial now under consideration.

But we are not now concerned in deciding between two methods of arriving at a knowledge of handwriting, but whether, when the genuineness of it is in issue, the knowledge that may be derived from other productions of the same hand, is to be altogether excluded from the inquiry. Now, for my own part, I am ready to avow my entire concurrence in the sentiments of my brother *Peake* on this point, but that my opinion goes much farther than his. He says, after reviewing the cases of *Macferson v. Thoytes (a)*, *Rex v. Cator (b)*, and others of the same period, "The analogies of law, however, appear strongly to support the admissibility of this evidence ; for opinion, founded on observation and experience, is received in most questions of a similar nature. There is a certain freedom of character in that which is original which imitation seldom attains, and the want of that freedom is more likely to be detected by one whose attention has been directed to the subject, than by another who has never given his mind to such pursuits. It does therefore seem rather too much to say that such evidence is in all cases inadmissible ; though it certainly ought to be received with great caution, and meet with little attention, unless as corroborating other and stronger evidence." With regard to the form in which the question was proposed in the late trial, if the examples of Lord *Kenyon*, *Le Blanc* and *Lawrence Js.*, and Lord *Tenterden*,

(a) *Peake's C. N. P.* 20.

(b) 4 *Esp.* 117.

render it doubtful whether it was the only proper form, I think, on tracing the subject through the books, that it was the *most* proper form. If the proved document and the controverted are both in Court, and the witness speaks to their resemblance or difference from immediate observation, he seems to perform a task for the jury which every one of them, even though illiterate, might as well perform for himself. But if he is a person of some skill, (however low in degree and however generally shared with him,) he does what, possibly, the jury may be incompetent to do. Even in these times some may serve as jurors who cannot read and write; but to produce a person who could barely read and write, to speak of his own knowledge and judgment in handwriting, would rather tend to throw ridicule than any degree of light on the cause. The witness must be conversant with handwriting,—a banker, a printer, the officer of a court of justice, (which was the description, I believe, of Mr. *Price*, when Lord *Tenterden* attended the Oxford circuit as a barrister, and *Lawrence J.* placed the documents in his hand,)—to be entitled to any degree of authority. From the substitution of a witness for the jury in forming an opinion on the genuineness of handwriting, an advantage follows so great and obvious, that it would form a strong motive for so framing the rule of evidence—I mean the prevention of that distracting multiplicity of issues which a jury might be called upon to try, arising out of every one of the whole number of documents placed before them. If this should be done, a legitimate argument might be raised from the internal evidence of the contents of each paper, and the nature of each transaction alluded to therein. On these points the party could not be expected to come prepared, and infinite injustice might ensue from prejudices of every kind. I therefore entirely adhere to *Doe v. Newton* (a), in which we refused a rule nisi for a new trial, moved for on the ground that my brother *Coleridge* had excluded papers tendered in evidence for the mere purpose of being

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(a) 1 N. & P. 1.

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compared with some which were proved. Indeed, in *Griffith v. Williams* (a), which was urged as an authority for receiving such evidence, the Court of Exchequer drew precisely the line which I think the true one, observing that the Court and jury might compare letters when they had been admitted for the general purposes of the cause, though witnesses are only permitted to compare them with the character of handwriting impressed on their own minds. The same effect, I am aware, might possibly be produced if the writing from which the handwriting was judged of were in Court; for I apprehend the jury might then desire to see the documents on which the witness judged; and my brother *Parke* has informed me, that at nisi prius he has felt himself bound to permit them. Prejudice might thus be unfairly excited by a crafty selection. This would be an abuse, and when exposed in broad daylight, would draw the usual consequences of taking unfair advantages on the party making the attempt. But the possibility of abuse is no reason for excluding what may throw light on the truth, and is in its own nature evidence. Some other matters were discussed at the bar, connected with this interesting subject, which do not require a detailed notice. On the question, whether handwriting, looked at by itself, is genuine or forged,—the cases appear to me to have justly exploded the notion that bare inspection by the most skilful person can furnish means for forming an opinion; and *Gurney v. Langlands* (b) is a correct decision, I think, of *Wood B.*, supported by the dicta of *Lord Tenterden C. J.* and *Holroyd J.*, that such an opinion cannot be received from one not acquainted with the handwriting supposed to be imitated. I do not indeed understand how such evidence could be rejected if a witness should swear that his habits gave him the requisite skill; but I do not think that either Court or jury would believe him, or place the least reliance on his opinions. Practically, therefore, this chapter may be considered as expunged from the book of evidence.

(a) 1 C. & J. 47.

(b) 5 B. & A. 330.

I know not whether any argument was raised on the knowledge being gained post litem motam. But the judgment is almost always formed post litem motam, both on handwriting and other subjects of speculation. There seems no reason why the knowledge should not be obtained in the same stage. Indeed, the opinion of medical men is constantly taken on facts brought to their knowledge during the trial. On the whole, I think the question regular, and the exclusion of the evidence improper; but the Court being equally divided, the rule for a new trial must be discharged.

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Rule discharged.

Ex parte H. T. LEE, claiming compensation for the loss of the office of Town Clerk of the Borough of LYME REGIS.

THE principal facts set forth in Mr. Lee's affidavit were as follows:

21st August, 1835. *Smith*, the late town clerk, died.

31st August, 1835. *Lee* was appointed town clerk on one of the usual prescriptive days for such appointment. The appointment was in the usual form, which was always for life.

Lee had frequently performed the duties of the office for *Smith*, who resided at Axminster, in Devon; and it was generally understood that *Lee* would succeed to the office upon a vacancy.

September 9, 1835. By the 66th section of the Municipal Reform Act, 5 & 6 Will. 4, c. 76, which received the royal assent on that day, it is provided, "That every officer of any borough who shall be in any office of profit at the

Under the 66th section of the Municipal Reform Act (5 & 6 W. 4, c. 76,) which directs that an adequate compensation shall be assessed and paid to town clerks removed from office under that act, a party appointed whilst the bill was before parliament, though the appointment was in the usual form for life, is en-

titled to nominal compensation only upon being so removed.

Where the right to compensation is purely nominal, the Court will not grant a mandamus.

Whether the Court of King's Bench has power to revise the decision of the Lords of the Treasury, upon a claim of compensation under this statute, *quære*.

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time of the passing of the act (9th September, 1835,) who shall be removed from his office under the provisions of the act, or who shall not be re-appointed, shall be entitled to have an adequate compensation to be assessed by the counsel and paid out of the borough fund, for the salary, fees, and emoluments, of the office which he shall so cease to hold; regard being had to the manner of his appointment to the office, his term or interest therein, and all other circumstances of the case."

September 10, 1835. By a Treasury minute of this date, their lordships referred to an act of 1 *Will.* 4, c. 58, by which the legislature had secured compensation to officers of the Courts of Law upon abolition of office; and their lordships, by such minute, declared that they considered that the principle adopted by the legislature in the fore-cited act, might fairly be applied to the cases of the town clerks, and that they were of opinion that in all cases where such officer held his office for life, or where the usage had been such as to raise a just expectation that the office should continue for the life of the holder, a compensation of not less than two-thirds of his profits might be granted to such officer, estimated and calculated as therein mentioned.

January 1, 1836. In consequence of a message from the mayor *Lee* attended the Guildhall, when it was proposed that *Lee* should be continued in the office. This proposal was negatived, and *H. F. Waring* was appointed; upon which, the mayor, in the presence and the hearing of the council, said, "Mr. *Lee*, we know that you are entitled to compensation, and will treat you honourably."

June, 1836. *Lee* presented his claim for compensation, setting forth the particulars as directed by the act, amounting to 1513*l.*, being the value of an annuity for the life of *Lee*, for two-thirds of the clear profits of the office, being the lowest scale mentioned in the Treasury minutes of the 10th September.

July 30, 1836. *Lee* was informed by a letter from the

town clerk that, under the peculiar circumstances of *Lee's* election to the office, the council did not consider themselves justified in awarding any compensation, unless under the directions of that tribunal, to which they presumed *Lee* would apply.

August, 1836. *Lee* presented his claim to the Lords of the Treasury.

September 2, 1836. The Treasury sent to *Lee* a copy of a letter addressed to their lordships, from the town clerk, stating that the council had rejected the claim for compensation because *Lee* had previously been a capital burgess, and because at the time of his appointment the bill had passed the Commons, and had, with certain modifications, received the sanction of the Lords; and that the council submitted to their lordships, that *Lee's* services for the period of four months, with the morally certain prospect, from the first day of his election, of his removal, could not, on any principle of justice, entitle him to any compensation.

September 16, 1836. *Lee* addressed a letter to the Treasury, in which he remarked that the capital burgesses were always selected from the most respectable freemen; and that the knowledge he had acquired as a capital burgess in the affairs and interest of the corporation would scarcely render him less eligible to execute the duties of town clerk. That for many years before the death of *Smith* it was generally understood that *Lee* would succeed to the office whenever a vacancy should occur, and that it would not be material that the event of *Smith's* death happened whilst the bill was before parliament; that it was true that the bill had, with certain modifications, received the sanction of the House of Lords, but that one of such modifications was a clause enacting that the existing town clerks should retain their office for life, and that such clause actually stood as part of the bill at the time of *Lee's* appointment, and was only withdrawn on the express declaration of the noble lord at the head of His Majesty's government "that

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he was ready to give full and fair compensation to town clerks for all the emoluments which they should lose by the operation of the bill." That with reference to the allegation, that he could not, upon any principle of justice, claim compensation for four months' services, he submitted that the compensation clause clearly contemplated compensation for the loss of future profits, and not in respect of services already performed, which was of course paid for in the fees of office as they accrued. That no person had suggested, nor could suggest, any doubt as to the competency of *Lee* to fill the office, either in point of personal respectability or of professional skill. That at the time of his election it was uncertain which political party was likely to preponderate in case the bill passed; and that as he had never interfered in political quarrels, he reasonably expected that whatever might be the result, his appointment would not be disturbed. That the circumstance of his having held the office for so short a period strengthened his claim to compensation, insomuch as the advantages which he had derived from it were proportionably less.

October 6, 1836. A copy of this answer being transmitted by the Lords of the Treasury to the town council of Lyme Regis, they stated, in answer, that they believed *Lee* had been appointed to the office under a charter which, they had heard, had not been accepted, and that the appointment had no stamp.

October 28, 1836. The Lords of the Treasury communicated to *Lee* their decision upon his claim in the following terms:—

"Read a letter from the town clerk of Lyme Regis, dated 6th inst., containing the reply of the town council to the communication of this board of the 22nd ultimo, relative to the case of Mr. *Henry Trotman Lee*, town clerk of that borough, together with a copy of that gentleman's appointment, as called for by my lords' said letter.

"My lords read the Municipal Corporation Act.

" My lords read their minute on the subject of compensation of town clerks.

" Read also the several papers in the case of Mr. Lee, late town clerk of Lyme Regis.

" My lords advert to the case as it appears from the different statements of the parties.

" The appointment of town clerk does not contain any specific tenure under which he should hold the office. By the charter it would appear, that such tenure was during good behaviour. But by prescriptive usage, under which it was contended Mr. Lee was appointed, the tenure was for life.

" My lords observe, that in the report of the Commons on Municipal Corporations, it is stated to be held for life.

" The office became last vacant on the 21st of August, 1835, and on the 31st of that month Mr. Lee resigned his office of capital burgess and was elected town clerk.

" My lords advert to the fact that the Municipal Corporation Act had passed the House of Commons, and been read the second time in the House of Lords, previous to Mr. Lee's appointment.

" My lords are willing to consider, in the spirit of liberality, the claims of those town clerks who accepted such appointments upon a just expectation that such situation should continue for life; but considering that, previous to Mr. Lee's appointment, the Municipal Act had been long before the legislature and the public, had already been sanctioned by the House of Commons, and been read a second time in the House of Lords, my lords cannot but consider that Mr. Lee accepted his office with due notice of what might occur, and are not of opinion that any reasonable expectation would be entertained of its permanency.

" Adverting therefore to the manner of Mr. Lee's appointment to his tenure or interest therein, and all other circumstances of the case, my lords are pleased to determine that Mr. Lee is entitled to no compensation for the

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loss of his office of town clerk of the borough of Lyme Regis.

"Let an order in conformity with this minute be prepared for the signature of my lords, and let it be transmitted, together with a copy of this minute, to the Mayor of Lyme Regis.

"Transmit copy of this minute to Mr. Lee."

March 18, 1837. *Lee* presented a second petition to the Treasury, calling their lordships' attention to the circumstance that, by the 66th section, compensation is given absolutely to every borough officer removed; and that the words, regard being had to the manner of his appointment to the office, his term or interest therein, and all other the circumstances of the case, apply merely to the quantum of compensation; and that the terms of the minute of 10th September, 1835, assuring compensation of not less than two-thirds of the profits, in all cases where the officer held his office for life, or where the usage had been such as to raise a just expectation that the office should continue for the life of the holder, appeared to have received, in the minute of the 28th of October, a construction which those terms will not warrant. That the just expectation of continuance related only to cases where the appointment was not for life, and did not affect the case of a party appointed for life.

April 25, 1837. The secretary of the Treasury transmitted the following answer:—"The Lords Commissioners of His Majesty's Treasury having had under their consideration your further memorial on the subject of their lordships' minute, dated 28th October last, on your claim to compensation as late town clerk of the borough of Lyme Regis, I am desired by their lordships to inform you, that they see no reason to alter their decision on your case."

Upon this affidavit *Manning*, on the last day of Easter term, moved for a rule calling upon the mayor, aldermen, and burgesses of the borough of Lyme Regis to shew cause why a mandamus should not issue, requiring them to assess

an adequate compensation to be paid to *Lee* out of the borough fund, for the salary, fees, and emoluments of the office of town clerk of that borough.

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*Manning*, in support of the application. Upon the construction of the 66th section, it is impossible for any lawyer, or even for any attentive reader to entertain a doubt that every person dismissed from a borough office under the provisions of the act, is entitled to some compensation. The amount of the compensation is left to the town council, subject to the superintendence of the Lords of the Treasury. As in this case, the town council have assessed no compensation; they have in point of law done nothing, as the act gives them no authority to decide whether a party whom the act directs to be compensated shall or shall not receive any compensation; and although *Mr. Lee* has carried the matter before the Lords of the Treasury, as suggested by the town council, the Treasury in this case appear to have no jurisdiction whatever. Should the Court however be of opinion that the Treasury has jurisdiction in this case, then the decision of the Treasury, that *Mr. Lee* is entitled to no compensation in a case in which the statute expressly gives compensation, is a mere nullity; and in that view of the case it is submitted the Court will grant a mandamus to the Lords of the Treasury, requiring them to make such order upon *Mr. Lee's* memorial to them, as to them shall seem just. *Mr. Lee* cannot be deprived of his freehold office and at the same time be refused all compensation, without flagrant injustice to *Mr. Lee*,—without a breach of the compact which was entered into between the House of Lords and the heads of His Majesty's government,—and without a direct violation of the Treasury minute, made on the day after the bill received the royal assent, for the express purpose of giving effect to that arrangement. The Lords of the Treasury seem to have fallen into a singular error, in giving effect, or rather in refusing to give effect to their own minute of 10th Septem-

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ber, made in the moment of danger. That minute proposes indemnity equal to two-thirds of the profits, and (in conformity with the provisions of the 66th section) proposes it in all cases where the officer holds his office for life, or where the usage raises a just expectation of continuance for life. That is, every officer, who at the time of the passing of the act holds an office for life, shall receive an indemnity equal to two-thirds of the profits of the office; but as persons not legally appointed for life may, in point of fact, be injured by their removal from office under the provisions of the act, in cases where the usage has been to continue the appointment for life, we will not confine the compensation of two-thirds to persons having a strict legal interest for life, but will extend it to persons appointed during pleasure, in places where the usage has been not to remove. This is the clear, plain meaning of the Treasury minute of 10th September; and in framing that minute the Lords of the Treasury were, as they professed to be, putting a liberal construction upon that part of the 66th section, which directs that regard shall be had to the manner of the appointment, the term and interest in the office, and the other circumstances of the case. By apportioning two-thirds as the minimum of compensation, it was fixing upon a liberal scale that which the statute left at large. But according to the construction now put upon the Treasury minute of 10th September, it operates as a repeal *pro tanto* of the statute which had passed the day before. It is now contended, that the proposal to secure two-thirds of the profits to "every officer who held his office for life, or where the usage raised a just expectation that the office should continue for life," means to "every officer who held his office for life, provided he had a just expectation that under the new order of things, which would take place if the bill in progress were carried into a law without the Lords' amendment, his appointment would be continued to him for life.

The Lords of the Treasury have no other interest in this

matter than to do justice between Mr. *Lee* and the town council of Lyme Regis; but in ordinary cases between party and party, the attempt to put such a construction upon a contract would be denominated a fraud.

If the Municipal Reform Bill had passed into a law with the Lords' amendment, Mr. *Lee* would have held the office for life. The object and the effect of the arrangement was to secure to town clerks the same pecuniary benefit as they would have enjoyed in case the Lords' amendment had not been withdrawn. And this arrangement was immediately ratified and reduced into an authentic form by the Treasury minute of 10th September. The only question for the town council or for the Treasury in this particular case is, how much Mr. *Lee* is damnified by the power of removal given by the act—how much he is worse off than he would have been if the act had never passed, or if the Lords' amendment had never been abandoned. The compensation claimed is calculated according to what the Treasury minute, made contemporaneously with the withdrawing of the Lords' opposition, state as the lowest scale of compensation, and no objection is raised either as to the items constituting their annual profits, or to the result worked out.

The COURT said that they would let *Manning* know in the following term whether he might take a rule to shew cause, and that in the meantime they would look at the affidavit.

Lord DENMAN C. J., in the course of this term, delivered the judgment of the Court, as follows:

In this case Mr. *Manning* moved for a mandamus to assess compensation to Mr. *Lee*, the late town clerk of the borough of Lyme Regis, for his removal from that office. Mr. *Lee* first applies to the town council—they refuse. He then appeals to the Lords of the Treasury, who think the town council right. Mr. *Lee* was appointed to the office

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of town clerk on the 31st August, 1835, a little before the Municipal Reform Act passed. If any thing called upon us to grant a mandamus it could only be for the lowest compensation; there could be no real loss; he must have known, when he was appointed, that the appointment would cease soon. We are not bound to grant a mandamus where it would be purely nominal. We are satisfied that the town council and the Lords of the Treasury are right.

I do not enter into the question whether we could revise what the Lords of the Treasury had done.

Rule refused.

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HITCHCOCK v. WAY.

The 1st sect.  
of the 5 & 6  
*Will.* 4, c. 41,  
making bills  
given for gam-  
bling transac-  
tions voidable  
only, and not  
void, is, as  
well as the  
2nd section,  
*prospective.*

**ASSUMPSIT**, by indorsee, against the acceptor of a bill of exchange, drawn 25th September, 1830, at three months after date. Plea, the general issue. The action was commenced in Michaelmas term, 1831. At the trial before *Coleridge J.*, in Hilary term, 1836, the defence set up was, that the bill had been given for a gambling transaction, and was therefore void within the 9th *Ann.* c. 14. The counsel for the plaintiff contended that as the plaintiff was a bonâ fide holder, and had had no notice of the gambling, the bill was set up by the 5 & 6 *Will.* 4, c. 41. The learned judge was of this opinion, and left it to the jury to say whether the plaintiff was a bonâ fide holder. The jury found for the plaintiff; and his lordship gave leave to the defendant to move to set aside the verdict, and enter a nonsuit. A rule having been obtained accordingly,

*Maule* and *Humfrey*, in Easter term last (a), shewed cause against it. The words of the first section of the 5 & 6 *Will.* 4, c. 41, clearly include a case like the present, for they expressly repeal all the preceding statutes rendering a

(a) April 24th, before Lord *Denman C. J.*, *Littledale*, *Patteson*, and *Coleridge Js.*

bill of this kind void. The rule as to the effect produced on the law by an act of parliament repealing former acts, is thus laid down by Lord *Tenterden* in *Surtees v. Ellison* (a): "It has been long established, that where an act of parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed." On applying that rule to the present case, as the act repeals the statutes rendering such bill void, the bill stands like any other; but the act goes farther, for after repealing the former statutes, it expressly enacts that every note, bill, &c. which, if this act had not been passed, would, by virtue of the said acts, have been absolutely void, shall be deemed and taken to have been made for an illegal consideration, that is, should be voidable only, and that the former acts should be construed as if they made such bills voidable only. When the legislature intended to provide for future transactions, as in the second section, they used different language, which shews that the 1st section was intended to be retrospective. [*Patteson J.* Suppose the new rules had been in existence at the time when the action was brought, and it had been pleaded specially that the bill had been given for a gambling transaction, and there had been a demurrer admitting the facts, and judgment for the defendant, and subsequently the 5 & 6 Will. 4 had passed,—how could the plaintiff have availed himself of it?] He might have had judgment *non obstante veredicto*. [*Patteson J.* No; for at all events evidence would be necessary to shew that the plaintiff was a *bonâ fide* holder to entitle him to a verdict.] Then he might have been left to an *auditâ querelâ*. The great object of this act was to protect the *bonâ fide* holder of bills like this, to whom great injustice was constantly done by setting up a defence of gambling, of which they knew nothing, to a bill for which they had given full value. No injustice therefore is done by construing the act to be retrospective, according to the plain meaning of its language. There are many instances where statutes have

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(a) 9 B. & C 750; 4 M. & R. 586.

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been held to have a retrospective effect. In *Towler v. Chatterton* (a), although the parties were at issue before Lord Tenterden's act passed, (9 Geo. 4, c. 14,) which requires a promise to be in writing to take a case out of the Statute of Limitations, the Court held that that act applied to a promise made before the act. Lord Tenterden ruled to the same effect at *nisi prius*, in *Hilliard v. Lenard* (b). So, on the 3 & 4 Will. 4, c. 42, giving costs against executor plaintiffs, the Court held, that an executrix, who had commenced an action before the act passed, was liable to costs: *Grant v. Kemp* (c). [Lord Denman C. J. This Court ruled to the same effect in *Freeman v. Moyes* (d).] *Charrington v. Meatheringam* (e) is a decision to the same effect, on the 5 & 6 Will. 4, c. 50. That case was an action against parish officers for making a distress for poor and highway rates; and the 13 Geo. 3, c. 78, provides that in actions for acts done in pursuance of the act, if the plaintiff shall become nonsuit, the defendant shall recover treble costs. That act was repealed by the 5 & 6 Will. 4, c. 50, which was not passed till some days after the cause came on for trial, but before judgment was signed; and the Court held that the act was retrospective. The only exception Lord Tenterden made to the retrospective operation of 9 Geo. 4, c. 14, was to cases past and closed: *Hilliard v. Lenard* (b). It cannot be said the transaction was closed here till the defendant paid the bill, or till the Court decided that the bill ought not to be paid. [Coleridge J. Are you aware of the case of *Jaques v. Withy* (f), in which it was held, that a contract declared by statute to be illegal, was not made valid by the repeal of that statute; and the distinction was pointed out, that if the contract had been originally good, and a statute had passed to declare it illegal, the repeal of that statute would have set up the contract again? In the present case the contract was void at the time of making it.] *Jaques v.*

(a) 6 Bing. 258.

(b) M. & M. 297.

(c) 2 C. & M. 636.

(d) 3 N. & M. 883; 1 A. & E.

33E.

(e) 2 M. & W. 228.

(f) 1 II. Bl. 65.

*Withy (a)* turned upon gaming in the lottery, and the 22 Geo. 3, c. 47, having repealed the former acts, it left the contract as it was at the time of making it void; but the 5 & 6 Will. 4 goes further, for it enacts that such bills, &c. shall not be void, but voidable. It therefore sets up transactions of this kind, and gives them a new character.

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Sir *J. Campbell* A. G., Sir *W. W. Follett*, and *Martin*, contrà. The words of the 1st section of this act are clearly only prospective. At the time the bill was drawn, accepted, and indorsed, the contract was void; and therefore falls completely within the distinction laid down by *Adair*, *arguendo* in *Jaques v. Withy (a)*, that a statute repealing another never sets up a contract that was void *ab initio*. Taking the definition of Lord *Tenterden* in *Towler v. Chatterton (b)* to be correct, that a statute repealed is as if it never existed, except in transactions past and closed, this case comes within the exception laid down by him, for the transaction was past and closed before the passing the act. What remained to be done on the bill? It is suggested, to pay it; but the defendant was not liable to pay, nor could the plaintiff enforce payment. It is allowed that the second section is only prospective; but if the first, which repeals the former statutes, is retrospective, then in the interval between the repeal of the former statutes, and the second (c) section coming into operation, a loser at play may have to

(a) 1 H. Bl. 65.

(b) 6 Bing. 258.

(c) Sect. 2. "That in case any person shall, after the passing of this act, make, draw, give, or execute any note, for any consideration, on account of which the same is, by the hereinbefore recited acts of the 16 Car. 2, 10 Will. 3, 9 & 11 Anne, or by any one or more of such acts, declared to be void, and such person shall actually pay to any indorsee, holder, or assignee of such note, the amount of the

money thereby secured, or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last-named person, to the person who shall so have paid the money, and shall accordingly be recoverable by action at law, in any of his Majesty's Courts of Record.

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pay bills, given during that interval, in respect of a gambling transaction, although such bills before the act were void, and although after the act comes into operation he may recover back the amount of such bills from the person to whom he gave them. Could the legislature intend thus to alter the situation of the loser during this period, or to encourage gaming by benefitting persons taking bills under such circumstances? [*Patteson J.* Taking the two sections together, it seemed to be the intention of the legislature that there should be no loser, for the bonâ fide holder is to recover from the loser in the first instance, and then he may recover back from the party to whom he gave the bill. But that could not be if one section is retrospective and the other prospective.] The second section throws important light on the first, and shews that both sections were only intended to be prospective. The cases cited do not apply to the present act, and by none of them were the relative situations of parties changed. The decisions on the 9 Geo. 4 had not in the first place the effect of setting up contracts which were void *ab initio*, but only legislated on the evidence which should be given; and, secondly, that act had seven months to run before it came into effect. In *Towler v. Chatterton* (a) this provision was expressly pointed out by *Parke J.* The act did not repeal any previous statute, but it required certain evidence to be produced at the trial; and the Court held that they were bound by the words of the statute, which applied to the trial: *Ansell v. Ansell* (b). In *Surtees v. Ellison* (c) it was discovered, that by some blunder in the Bankrupt Act, it was not to take effect till a subsequent period; and as it repealed all former acts, no commission could issue upon it for an act of bankruptcy before the passing of the act. That is the whole effect of that decision. In *Freeman v. Moyes* (d), where the Court decided to give costs against an executor plaintiff, the decision proceeded, like the decisions upon *Lord Tenterden's* act, on the words of the statute being retrospective.

(a) 6 Bing. 258.

(c) 9 B. &amp; C. 750; 4 M. &amp; R. 586.

(b) M. &amp; M. 299; S. C. 3 C. &amp;

(d) 3 N. &amp; M. 883; 1 A. &amp; E.

P. 563.

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*Littledale J.* dissented altogether from the doctrine; but it is not necessary to question the decision, as it did not turn upon the effect of the repeal of a statute. [*Patteson J.* In *Bacon's Abr. Stat. (C)*, it is stated, that "it is in the general true that no statute is to have a retrospect beyond the time of its commencement."] So, in *Paddon v. Bartlett (a)*, where the question was, whether the forty-second section of the 3 & 4 *Will. 4*, c. 27, was retrospective, the Court held it was not; and Lord Abinger C. B. said,—“Courts in general will not construe acts as retrospective unless the meaning is very plain.”

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*Cur. adv. vult.*

Lord DENMAN C. J., in the course of this term, delivered the judgment of the Court, as follows:—

The plaintiff sued as indorsee of a bill of exchange given to one *Bevan* for money lost at play. *Bevan* indorsed it to the plaintiff, who gave value for it, and knew nothing of the original consideration. On these facts the defendant obtained a rule for entering a nonsuit under 9 *Ann. c. 14*. The plaintiff set up 5 & 6 *Will. 4*, c. 41, s. 1, as an answer. The action had been brought long before the latter act passed. The plea of non-assumpsit, pleaded before the new rules, entitled the defendant to make his present defence. After issue joined, the act was passed repealing that part of the former statute which makes the bill void, and enacting, that any bill “which, if that act had not passed, would have been absolutely void, *shall be deemed and taken to have been made and drawn for an illegal consideration,*” and that the same consequences shall ensue.

The plaintiff argued that this enactment could only receive effect at the time of trial, and the Court was bound to act upon it at that period; and many cases were cited in which acts of parliament repealing and altering the law had been so construed. But they all turned on the peculiar wording of those acts, which appeared to the Court to compel them to give the law an *ex post facto* operation. It is

(a) 4 N. & M. 1—321; 2 A. & E. 9; 3 A. & E. 884.

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enough to say that we find no such words in the 5 & 6 Will. 4, c. 41, and are of opinion in general, that the law, as it existed when the action was commenced, must decide the rights of the parties in the suit, unless the legislature express a clear intention to vary the relation of litigant parties to each other.

In the present case we should have been glad to come to a different conclusion, but think we are not warranted in doing so, but that the rule for a nonsuit must be absolute.

Rule absolute.

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VALLANCE v. SIDDEL.

1. The 58 Geo. 3, c. 93, only protects *bonâ fide* holders of bills or notes tainted with usury, who have *discounted* such bills, or paid valuable consideration for them at the time of indorsement, and does not include a *bonâ fide* holder who has taken such a bill in payment of an antecedent debt.

2. A note payable on demand, is a note payable within three months after the date thereof, and therefore within the provisions of 3 & 4 Will. 4, c. 98, making such notes valid in the hands of a *bonâ fide* holder, although tainted with usury.

3. The 3 & 4 Will. 4, c. 98, s. 7, examined on the Parliament Roll, enacts, "nor shall the liability of any party to *any* bill of exchange or promissory note, be affected by reason of any statute or law in force for the prevention of usury."

**ASSUMPSIT** on a promissory note for 50*l.*, made by the defendant, payable to one *Joseph Ward*, or order, on demand, and by *Ward* indorsed to *Henry Broomhead*, and by *Broomhead* to the plaintiff. Plea: that before the making of the said note, it was corruptly, and against the form of the statute, agreed by and between the defendant and *T. Ward*, that *Ward* should lend and advance to the defendant the sum of 45*l.*, and that the defendant should give and pay to *Ward* the sum of 5*l.*, over and above all lawful interest, for the said loan of money, for such time as he *Ward* should forbear and give day of payment of the same; and that for the securing of the repayment of the said sum of 45*l.*, so to be lent and advanced as aforesaid, together with the said further sum of 5*l.*, the defendant should make the said promissory note. Averment: that the defendant, in pursuance of the said corrupt agreement, made the said promissory note, and that *Ward* lent and advanced to the defendant a certain sum, to wit, 34*l.* 11*s.* 1*d.*, parcel of the said sum of 45*l.*; and that the said sum of 5*l.*, so agreed to be paid by the defendant, exceeds the rate of 5*l.* for the

forbearing of 100*l.* for a year, contrary to the form of the statute.

Replication: that the plaintiff, before the payment of the money specified in the promissory note had been demanded of the defendant, became and was the indorsee of the said *H. Broomhead*, for valuable consideration; that is to say, in part payment of a certain large sum of money, exceeding the money then due and payable on the said promissory note, to wit, the sum of 100*l.*, before then and there due from *Broomhead* to plaintiff, for work and labour before then done by the plaintiff for *Broomhead*, at his request, and for monies paid &c., without his the plaintiff's having &c.; that he had not, at the time of doing the said work and labour, or paying the said monies as aforesaid, or at the time of *Broomhead*'s indorsing or delivering the said note, or at the time of the plaintiff's accepting or receiving the same, or at any other time before the commencement of this suit, actual notice, or any notice whatever, that such note had been given upon the said supposed usurious contract.

Demurrer and joinder.

The defendant stated in the marginal note to the demurrer, that the point intended to be insisted on was, that promissory notes, payable on demand, were not within the provisions of the 58 *Geo.* 3, c. 93, protecting bonâ fide holders of securities, without notice that they were given for a usurious consideration.

The plaintiff's marginal note stated, that the plaintiff intended to insist that he was within statute 3 & 4 *Will.* 4, c. 98, s. 7, and stat. 5 & 6 *Will.* 4, c. 41, or one of them, entitled to maintain this action, even if the Court shall hold him out of the benefit of 58 *Geo.* 3, c. 93.

*Cresswell*, in support of the demurrer (*a*). This note does not fall within the protection given by 58 *Geo.* 3, c. 93, for it does not appear that it was discounted, or that any consideration was paid for it, which are the only cases within the

(*a*) Before Lord Denman C.J., Littledale, Patteson and Coleridge Js.



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statute. All that the legislature intended to do, was to protect persons who advance money or goods on the credit of a bill tainted with usury, which they take *bonâ fide*. It was not intended to include cases like this, where the bill has been taken in payment of an antecedent debt. Under the Factors' Act (*a*), a person who has advanced money on a consignment, has a lien upon it to that amount, but not for an antecedent debt. [*Littledale J.* The wording of the 58 *Geo.* 3 is very extraordinary; the preamble states it to be for the relief of *bonâ fide* holders of negotiable securities; then the recital is, that negotiable securities often pass into the hands of persons who have *discounted* the same without notice; and the enactment is, that no bill or note shall be void in the hands of an indorsee for a *valuable consideration*, unless such indorsee had, at the time of *discounting* or *paying* such consideration, notice of the usury. Those provisions are contradictory, for the recital applies only to bills which have been discounted, but the enacting part includes all bills in the hands of an indorsee for a valuable consideration, which this plaintiff clearly is.] The latter part of the clause, "at the time of discounting or paying such consideration," reconciles the whole, and shews that either the bill must be discounted or goods advanced at the time the bill is taken.

The next statute is the 3 & 4 *Will.* 4, c. 98, s. 7 (*b*), but

(*a*) 6 *Geo.* 4, c. 94.

(*b*) Sect. 7. "That no bill of exchange or promissory note, made payable at or within three months after the date thereof, or not having more than three months to run, shall, by reason of any interest taken thereon, or secured thereby, or any agreement to pay or receive, or allow interest in discounting, negotiating or transferring the same, be void; nor shall the liability of any party to any bill of exchange or promissory note, be

affected by reason of any statute or law in force for the prevention of usury; nor shall any person or persons drawing, accepting, indorsing or signing any such bill or note, or lending or advancing any money, or taking more than the present rate of legal interest, in Great Britain and Ireland respectively, for the loan of money on any such bill or note, be subject to any penalties under any statute or law relating to usury, or any other penalty or forfeiture, any

that section applies only to bills given for a certain time, and was made in contemplation of times of pressure, when money might be advanced for a certain period on doubtful security, by the temptation of an increased rate of interest. There is nothing in the act to shew it meant to include notes on demand, where no forbearance is secured to the borrower. It has been held that there is no consideration to support a promise to pay the debt of another, when no time is given to the original debtor. The plea shews here, that whenever the money was to be paid, 5*l.* was to be paid besides lawful interest (*a*).

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*G. T. White*, *contra*. The language of the 3 & 4 *Will. 4*, c. 98, is quite large enough to include the present case. It is impossible to say that a note, payable on demand, is not payable within three months after the date thereof, or that it has more than three months to run; being so, the act says that such a note shall not be void. A party may pay a note away, payable on demand, but with the understanding that it shall not be presented for a month or two; still it is a note payable within three months. The act goes further, for it says, "nor shall the liability of any party to *any* bill of exchange or promissory note, be affected by reason of any statute or law in force for the prevention of usury." [*Patteson J.* That must be a misprint, the word "such" must be omitted.] The 58 *Geo. 3*, is certainly perplexed in its terms, and it may be admitted, that if the preamble was not enlarged by the enacting clause, the act would not apply, but the enacting words are, that no bill shall be void in the hands of an indorser for valuable consideration, without notice. The plaintiff stands here completely in that character. He has given valuable consideration for the note, for he gave his debtor credit for it. *Dand v. Sexton* (*b*), and *Wright*

thing in any law or statute relating to usury, in any part of the United Kingdom, to the contrary notwithstanding.

(*a*) The point that arose in *Hitchcock v. Way*, on the 3 & 6

*Will. 4*, c. 41, *ante*, 79, was also discussed, but the decision of the Court rendered any reference to that statute unnecessary.

(*b*) 3 T. R. 37.

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v. *Nuttall* (a), exemplify the mode in which the Courts make a general enactment override a more limited preatnble.

*Cresswell*, in reply. There is clearly an omission in the 7th section of the 3 & 4 Will. 4, c. 98. In *Connop v. Yeates* (b), *Platt arguendo* supplied the word "such," which evidently was inferred by the Court. The section clearly was intended only to apply to bills having some fixed time less than three months to run, not to notes payable on demand. [Lord *Denman* C. J. In construing the stamp acts, the Courts have held a note payable on demand, to be a note payable in less than two months, and within the second class of promissory notes mentioned in 55 Geo. 3, c. 184, sched. part 1; *Moyser v. Whitaker* (c), *Cheetham v. Butler* (d).] The words in those statutes are not quite the same as in this, and the object of the legislature in framing the first class of promissory notes, in the schedule to the 55 Geo. 3, was only to include reissuable notes. It has been said that valuable consideration was given for this note, in the shape of credit; but that is not so, for the plaintiff might have sued *Broomhead* the moment after he had taken the note; it did not alter his situation in the least.

*Cur. adv. vult.*

Lord DENMAN C. J., on this day delivered the judgment of the Court. After stating the pleadings, his lordship continued thus.—Is this replication good, and is the note available in the plaintiff's hands, by virtue of the 58 Geo. 3, c. 93, an act clearly intended to repeal the provision of the 12 Ann. c. 16, which rendered bills and notes, given for usurious consideration, void in the hands of a *bonâ fide* indorsee for valuable consideration, who had no notice of the usury? The 58 Geo. 3, however, does not repeal the statute of *Anne*, or any one of its provisions, nor indeed does it make any reference to that statute. Does it then, by its direct

(a) 5 M. & R. 434; S. C. 10 B. & C. 492.

(c) 9 B. & C. 409.

(d) 2 N. & M. 453; S. C. 5 B.

(b) 4 N. & M. 302; S. C. *Connop v. Meaks*, 2 A. & E. 326.

& Ad, 837.

operation, give validity to bills and notes in this condition? It recites that "in the course of mercantile transactions, negotiable securities often pass into the hands of parties, who have *discounted* the same, without any knowledge of the original consideration for which the same were given, and the avoidance of such (i. e. usurious) securities in the hands of *such bonâ fide* indorsees, without notice, is attended with great hardship and injustice." It is difficult to say that the *bonâ fide* indorsees, protected by this preamble, are other than "parties who have *discounted*" the negotiable security. The enacting part however goes somewhat further. "No bill of exchange or promissory note that shall be drawn or made after the passing of this act, shall, though it may have been given for a usurious consideration or upon a usurious contract, be void in the hands of an indorsee for valuable consideration, unless such indorsee had, at the time of discounting or *paying such valuable consideration* for the same, actual notice that such bill of exchange or promissory note had been originally given for a usurious consideration, or upon a usurious contract."

The enactment is not that the security shall not be void in the hands of any indorsee for valuable consideration, who was ignorant of the original vice, but only in the hands of some indorsee who had not actual notice on the occasion described in the act; i. e. the occasion of his discounting the same, or of his *paying* a valuable consideration for it. Now the bill declared upon was not discounted, nor was a valuable consideration paid for it, the words of this statute therefore do not appear to embrace it.

Is it then set up by the 7th section of the act, for renewing the privileges of the Bank of England (a)? The provision is, "that no bill of exchange or promissory note, made payable at or within three months after the date thereof, or not having more than three months to run, shall, by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive, or allow interest, in discount-

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ing, negotiating or transferring the same, be void." The argument was, that this enactment applied to such bills only as were drawn for a time certain. But though this transaction is wonderfully improvident on the defraudant's part, as he may give 5*l.* for the loan of money during a single hour, a bill payable on demand, and which may be enforced instantly, is undoubtedly payable within three months.

We are therefore not compelled to consider another argument raised by Mr. *White*, on the same clause, which, after specifically enacting as aforesaid, proceeds to say, "nor shall the liability of any party to any bill of exchange or promissory note, be affected by reason of any statute or law in force for the prevention of usury." Those words are accurately copied in the printed editions of the statutes from the Parliament Roll, which I have inspected; probably some restriction will be found inevitable, when they require to be applied in a court of justice.

Nor is it necessary to consider the effect of the more recent acts of parliament, 5 & 6 *Will.* 4, c. 41, the plaintiff being entitled to our judgment, for the reason above assigned.

Judgment for the plaintiff.

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SANDERSON v. BROWN.

1. Where notice of a *scire facias* is served upon country bail, two days' post from London, on the 18th, returnable the 19th, and the bail render their principal on the 24th:—Held, that the render is in time.

*BUSBY*, in Hilary term last, had obtained a rule calling upon the plaintiff to shew cause why an exoneretur should not be entered on the bail-piece in this cause, the defendant having been rendered into the custody of the gaoler of York Castle.

By the affidavits used on the motion, it appeared that judgment was signed against the defendant on the 26th July, 1836. A *ca. sa.* was issued against him, tested on the 28th October, returnable on the 9th November. On the 14th November a *sci. fa.* was issued out against the bail, returnable.

2. *Semle*, under R. H. T. 2 *Will.* 4, No. 81, that country bail have eight days after the return of a writ of *sci. fa.* to render their principal.

able on the 19th November. The bail were served with notice of the *sci. fa.* on the 18th November, at their place of residence in Yorkshire, which is two days' post from London. On the 20th (which was the first post day), the defendant's attorney in Yorkshire wrote to London for a judge's order to render the defendant; the order was received at the attorney's office on the evening of the 23d, and on the 24th the defendant was surrendered to York Castle.

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*Knowles*, on the last day of Hilary term, shewed cause. The question is, whether the render was in time. The case was originally before *Patteson J.* at chambers, who at first thought it was; but he subsequently directed the point to be brought before the Court, and thought that it was matter for a new rule. By the rule Hil. 2 Will. 4, r. 81 (a), judgment may be signed against the bail after eight days from the return of the writ of *sci. fa.* by leave. By the old practice, writs of *sci. fa.* and *alias sci. fa.* were issued out against the bail, and on returns of *nihil* by the sheriff, judgment might be signed against the bail, without it being necessary to give them any notice, as two *nihils* were deemed equivalent to a *scire feci*. The whole object of the new rule was to substitute one writ of *sci. fa.* for two. But it is said that it was also the intention to require notice to be given to the bail, and that the eight days expressed in the rule are to give them time to render the defendant. No such intention, however, is expressed, or is to be gathered by implication. The old practice, therefore, is not altered. In cases where bail can be summoned, which is only in Middlesex, it has been held to be sufficient if the bail have been summoned any time before the rising of the Court on which the *sci. fa.* is returnable; *Clarke v. Bradshaw* (b), which case has been recognized, since the new rules, in *Lewis v. Pine* (c).

(a) "No judgment shall be signed for non-appearance to a *scire facias* without leave of the Court or a judge, unless the defendant has been summoned; but such judg-

ment may be signed by leave, after eight days from the return of one *scire facias*."

(b) 1 East, 86.

(c) 2 Dowl. P. C. 133.

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The practice, therefore, does not require that the bail should have notice; and if it should be deemed expedient that they should, a new rule must be made. The analogy of the Reg. Trin. 3 Will. 4, r. 3, is relied upon, which enables bail, where debt is brought against them upon their recognizance, to render their principal within fourteen days after service of process upon them; but that is an express regulation on the action of debt, and does not include proceedings against bail by *sci. fa.*

*Busby*, contrâ. The old practice is abolished by the new rule, the only object of which was to give the bail the opportunity to render their principal. The construction of the rule contended for would place bail in a worse condition than they were before; because, where two writs of *sci. fa.* were necessary, there must have been fifteen days at least between the teste of the first and return of the second writ (*a*). The true construction of the rule is, that the bail shall have eight days to render the principal after notice of the *sci. fa.* If this is not so, the bail can never be exonerated. He also cited *Thorn v. Hutchinson* (*b*).

*Cur. adv. vult.*

June 10th. Lord DENMAN C. J. on this day delivered the judgment of the Court.

The question turns on the rule of Hil. T. 2 Will. 4, No. 81. Before and since that rule, if the bail be summoned, (which can only be in Middlesex, where the *scire facias* must be brought), the defendant must be rendered before the shutting of the office on the day of the return of one *scire facias*. Where the bail reside elsewhere, the practice of suing out two writs of *scire facias* is done away by the above rule; and an application to the Court or a judge, after eight days from the return of one writ, for leave to sign judgment, is substituted. Before such leave is given, it must be proved that notice has been given to the bail, or

(*a*) See 2 Tidd, 1125, 9th ed.

(*b*) 4 D. & R. 712; S. C. 3 B. & C. 112.

that proper endeavours have been made to do so without effect. The object of that notice is to enable the bail to render the defendant; and, accordingly, it is stated in a note to *Mr. Jervis's New Rules*, p. 64, (3d edit.) that *Bayley B.* in a case of *Newton v. Flight*, MS. 23d June, 1832, at chambers, held, that where no notice had been given, a render fourteen days after the return of the writ was in time. Here notice was given in Yorkshire the day before the return of the writ, but that notice is not the same thing as a summons in Middlesex. It would have entitled the plaintiff to obtain leave to sign judgment after eight days from the return-day, if nothing had been done in the meantime; but we are of opinion, that those eight days were given for the very purpose of enabling bail to render, though the rule is not confined to proceedings against bail. It would be very strange if it were otherwise, for then the bail would be placed in a worse situation by the rule in question than they were before; and if the plaintiff proceeds by action, they have fourteen days from the service of the writ to render, by rule III. Trin. T. 3 *Will.* 4.

For these reasons we think that the present rule must be made absolute.

Rule absolute.



BOWEN v. JENKINS.

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CASE for disturbance of common, by putting on divers cattle in and upon plaintiff's common, at divers days, and keeping the same there respectively as aforesaid. Plea, first, traversing the plaintiff's right of common: second, that before and at the said several times when &c., he, the said defendant, was and still is possessed of and in certain land, with the appurtenances, situate, lying, and being in &c., and that the occupiers of the said land, with the appurtenances, now have, and for and during the period of sixty years and upwards next before the commencement of this suit, without interruption, have had and used, and been used

*Wednesday,  
May 31st.*

In an action on the case for disturbance of common, when the defendant justifies on the days and times, &c. under a right of common for his cattle levant and couchant, the plaintiff must new assign, if he intends to prove a surcharge.



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and accustomed to have and use, without interruption, and of right ought to have had and used without interruption, and still of right ought to have and use, and the defendant, as occupier of the said land, of right ought to have and use common of pasture in and upon and throughout the said place, called "The Golden Mile Common," for all his and their commonable cattle, levant and couchant, in and upon the said land, with the appurtenances, every year and at all times of the year, as to the said land with the appurtenances belonging and appertaining; and the said defendant being so possessed, and being so entitled to the said right of common as aforesaid, he, the said defendant afterwards, and at the said several times when &c. in the said declaration mentioned, put, and caused to be put, the said cattle in the said declaration mentioned, being the said defendant's own commonable cattle, levant and couchant, in and upon the said land, with the appurtenances of the said defendant, to use the said common of pasture of the said defendant there, and kept and detained the same there for the said space of time in the said declaration mentioned, for the purpose aforesaid, as he lawfully might for the cause aforesaid, which is the same putting and causing to be put, and keeping and detaining of the said cattle in and upon the said waste or common, called "The Golden Mile Common," as in the said declaration mentioned, and whereof the said plaintiff hath above complained against the said defendant: And this the said defendant is ready to verify.

Replication, to the first plea, similiter. To the second plea, that all the said cattle in the said declaration mentioned, at the said several times when &c., were not the said defendant's own commonable cattle levant and couchant in and upon the said land, with the appurtenances of the said defendant, in manner and form as the said defendant hath above in his said plea thereof alleged; concluding to the country.

At the trial at the summer assizes, 1835, before *Patteson J.*, the counsel for the plaintiff admitted that the defendant, on all the days and times mentioned in the declara-

tion, was entitled to turn on his cattle levant and couchant; but opened a case of surcharge. The learned judge, upon this opening, refused to hear evidence of surcharge, as he ruled there ought to have been a new assignment; and he directed a verdict for the defendant.

*J. Evans*, in the subsequent term, obtained a rule calling upon the defendant to shew cause why the verdict should not be set aside and a new trial had, and contended that *Ellis v. Rowles* (a), which was cited for the defendant at the trial, did not apply.

*E. V. Williams*, on a preceding day in Easter term last, shewed cause (b). *Ellis v. Rowles* (a) was not cited as an authority that a new assignment is requisite in the present instance. That case was trespass for impounding the defendant's cattle. The defendant justified as lord of the manor, taking the cattle damage feasant. The plaintiff replied a right of common; and the defendant rejoined that he took the cattle for a surcharge: and it was held that this rejoinder was a departure from the plea. The following was the passage cited at the trial, from Serjt. *Williams's* note to *Mellor v. Spateman* (c):—"If the lord should bring an action of trespass q. c. f., instead of distraining, and the defendant should prescribe for common for his cattle *levant and couchant*, and aver that he put the cattle mentioned in the declaration, *being his commonable cattle levant and couchant on his land into the common*, in case some of the cattle were *not levant and couchant*, it should seem the plaintiff should new assign the trespass, by stating that he brought his action for dispasturing the common with other cattle, and not traverse the levancy and couchancy. For in trespass it is sufficient for the defendant to shew any thing which excuses the trespass; and the number mentioned in the declaration is not material." For this passage *Ellis v. Rowles*, *Willes' Rep.* 638, is cited. But it is clear that the

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(a) *Willes*, 638.

(b) *May 1st*, *cor. Lord Den-*

*man C. J., Littledale, Patteson,*  
*and Coleridge Js.*

(c) 1 *Wms. Saund.* 346 e.

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learned serjeant did not deduce this proposition from that case, but from an elaborate retrospect of all the law on the subject, as the passage stood thus in the original edition, before *Willes's* reports were published (a). It is now submitted that the law so laid down is correct. In trespass q. c. f., the breaking and entering, and in the present action the disturbance of right of common, is the gist of the action; and the putting on cattle is merely the mode of the trespass in the one case, and of the disturbance in the other; and therein it differs from replevin or trespass *de bonis asportatis*, in which the taking of the cattle is of the essence of the action; but in trespass q. c. f., the mode is not essential; and before the New Rules there was always one count, generally for the breaking the plaintiff's close at A., without stating how; *Greene v. Jones* (b): and an action on the case for disturbance of common, and trespass q. c. f., are in this respect identical. Therefore here the question will not arise that is under discussion in the Exchequer, in *Norman v. Westcombe* (c), whether there should be a new assignment in an action of trespass *de bonis asportatis*, if the defendant can justify seizing a certain part only of the goods enumerated in the declaration. The principle, that the common bar to a general writ in trespass q. c. f. drives the plaintiff to a new assignment, has never been disputed. This is clearly explained in the same note to *Greene v. Jones* (b). In *Monprivatt v. Smith* (d), where, to breaking and entering a house, and staying therein three weeks, the defendant justified as to breaking and entering, and staying therein for twenty-four hours, under a writ of *fi. fa.*, and the plaintiff, admitting the writ, replied *de injuriâ*, Lord *Ellenborough* C. J. held, that if the plaintiff wished to rely on the defendant having stopped in the house more than twenty-four hours, he ought to have new assigned. The case of *Barnes*

(a) The first edition of Serjt. Williams's edition of Saunders was published in June, 1799, and Lord C. J. Willes's Reports were published in the November subsequent.

(b) 1 Wms. Saund. 299 b (n. 6).

(c) Reported on other points, 2 Mee. & Wels. 349.

(d) 2 Campb. 174.

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v. *Hunt* (a) may be cited on the other side, where it was held, that to a plea of licence to trespasses committed on divers days and times, the plaintiff having shewn a trespass prior to the date of the licence, he was entitled to a verdict on an issue simply denying the licence, without any new assignment. But if the licence had been co-extensive with the occasions of the trespasses, the plaintiff must have been driven to a new assignment if he meant to contend that on any one or more occasions the licence had been exceeded. Now here it is not contended that the defendant was not entitled to put on *some* sheep on every occasion when he did put them on. The question is merely as to excess; and *Lambert v. Hodgson* (b) shews, that where that is the case, the excess must be new assigned. It may be said that many of the cases cited have arisen upon replications *de injuriâ*, whereas in the present case the replication only offers a traverse that *all* the cattle were levant and couchant. But the word *all*, though not expressed, is of necessity implied in every replication to a plea of right of common. The defendant was bound to aver in his plea in substance, that all the cattle mentioned in the declaration were levant and couchant. The legal meaning of the replication is, that none of the cattle were levant and couchant, and that may be either in respect of the land being such that the cattle could not be levant and couchant; *Potter v. North* (c); or that they were not the defendant's; as it has been held that the commoner must either have an absolute or a special property in the cattle; *Manneton v. Trevilian* (d). But it was argued at the trial, that the allegation of *all* the cattle not being levant and couchant, would be supported by shewing that some were and some were not, and therefore that the replication did (in effect) new assign. This shews the sense of the old rule, that a formal new assignment is necessary in such cases; for if some of the cattle mentioned in the declaration were levant and couchant, and some were

(a) 11 East, 451.

(b) 1 Bingh. 317.

(c) 1 Wms. Saund. 350.

(d) 2 Show. 328.

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not, then, by the plaintiff's own shewing in his replication, he has brought his action in respect of some of the cattle mentioned in the declaration, without any ground whatever for so doing. A new assignment would, in effect, have said, "I am not bringing my action for the cattle that were levant and couchant, as you suppose by your plea, but for those which were not." It is true that in some cases the replication may have the nature of a new assignment, as where the plaintiff abuses a licence given him by law, which makes him a trespasser *ab initio*, as in *The Six Carpenters' case* (a). [Lord Denman C. J. Mr. Evans cited a case from *Roll. Abr.*, *Sloper v. Allen* (b), which appears to go much against your argument.] That was an action of replevin, in which the asportation is the gist of the action, and is therefore distinguishable. Here the number of the cattle is immaterial, being only the mode by which the disturbance of the common is created. The defendant alleges by his plea, that he has as much right on the common as the plaintiff. If the plaintiff therefore rely on a different cause of action from that which the plea apparently justifies, he ought to have newly assigned.

*J. Evans* and *Nicholls*, contra. It is unnecessary to discuss *Ellis v. Rowles* (c), as it has no relation to this case.

(a) 8 Rep. 146 a.

(b) *Roll. Abr. Trial*, Verdict, pl. 41. The following is a translation of the case contained in *Viner's Abridgment*, vol. xxi. pl. 41, page 422.

In replevin, if defendant justifies the taking damage feasant by reason of a common to such copyhold, for all beasts levant and couchant, and avers that those beasts were levant and couchant, &c. upon which the parties are at issue, and it is found that part of the beasts were levant and couchant, and part not. This is found wholly for the defendant, for the

issue is upon the whole, and the contrary thereof is found; *Tr. 17 Ja. B.*, between *Sloper* and *Allen*, *Per Curiam*. In the margin, this is added, *Brownl. 171, Trin. 15 Jac. S. C.* says, it was holden, on reading the record, that the plaintiff should have his judgment. Avowry is made for several causes, and it is found for the avowant for one, and against him for the rest; the avowant shall have return, for he had good cause to distrain, but he shall be amerced for the other pro falso clamore. *Jenk. 184, pl. 71, 185, pl. 80; S. P. Keilw. 31 b.*

(c) *Willes, 638.*

No doubt the defendant was bound to aver that the cattle were levant and couchant on his land; but he should have stated in his plea the number of commonable cattle that he turned on, as in *Mellor v. Spateman* (a) and *Ellis v. Rowles* (b). *Barnes v. Hunt* (c) shews that the defendant under his plea may justify putting on as many cattle as he is entitled to, and that if he has put on more, his plea fails. [*Littledale J.* Do you compare this plea to one of leave and licence, as in that case?] It is a similar defence. The plea is as large as the declaration. [*Littledale J.* The rule to be deduced from *Barnes v. Hunt* (c) is, that in a plea of leave and licence the defendant must prove a licence as extensive as the trespasses mentioned in the declaration. Suppose this were an action of trespass, and a justification under a right of way, you could not shew a trespass out of the way, without a new assignment.] This replication amounts to a new assignment. By the rules H. 4 Will. 4, V. in Trespass, r. 6, it is laid down that "in all actions in which such right of way or common, as aforesaid, or other similar right is so pleaded, that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively." [*Littledale J.* The meaning of that rule is, that the jury may be directed to find a verdict under one plea distributively, as they would have done formerly if several pleas had been on the record.] Then *Sloper v. Allen* (d) is directly in point. [*Littledale J.* That was in replevin; whereas this is in case. *Patteson J.* The report of the case in *Rolle* is unintelligible, for it says that the defendant justified for all his cattle levant and couchant, which is clearly a mistake for the plaintiff; and it is probable the plaintiff had judgment according to the report in *Brownlow*, 171; but at all events the action was in replevin.] But a new assignment

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(a) 1 Wms. Saund. 339.

(b) Willes, 638.

(c) 11 East, 451.

(d) Viner's Abridg. vol. xxi. pl. 41, page 422.

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is only necessary where the pleadings shew an answer to the whole declaration. Can it be said here that the plea would have been made out if only one of the cattle had been proved to be levant and couchant. The position cited from Serjt. *Williams* is a mere *dictum*; and at all events it only applies to an action of trespass, whereas this is case.

They also cited *Hayward v. Grant* (a), 2 Rol. Abr. Trial, Verdict (C), pl. 39; *Goram v. Sweeting* (b), *Colborne v. Stockdale* (c), *Knight v. Woore* (d), *Tapley v. Wainwright* (e), and *Phythian v. White* (f).

*Cur. adv. vult.*

LORD DENMAN C. J. on this day delivered the judgment of the Court:—This was an action on the case for disturbing the plaintiff's right of common, by turning on cattle on divers days and times. The defendant pleaded a right of common in himself, and justified turning on the cattle mentioned in the declaration, being his own commonable cattle levant and couchant on his land, which are the same supposed trespasses in the declaration mentioned.

The plaintiff replied, that *all* the cattle mentioned in the declaration were not the defendant's cattle levant and couchant modo et formâ.

Upon the plaintiff's opening it was admitted by his counsel, that on all the days and times some of the cattle turned on were levant and couchant, and that the action was for surcharging.

The learned judge thought that the surcharging ought to have been newly assigned, and refused to receive any evidence respecting it, directing the jury, upon the admitted facts, to find a verdict for the defendant. We are of opinion that he was right in so doing, and that this rule for a new trial

(a) 1 C. & P. 448, 677.

(b) 2 Wms. Saund. 206.

(c) 1 Str. 493.

(d) 3 Bingh. N. C. 3.

(e) 2 N. & M. 697; S.C. 5 B. & Ad. 395.

(f) 1 M. & W. 216.

must be discharged. The case of *Ellis v. Rowles* (a) was cited and relied on at the trial, but appears not to be in point. It is quoted in a note of Mr. Serjt. *Williams* to *Mellor v. Spateman* (b), as if it were an authority for a position there laid down, viz. "that if a lord bring trespass, and the defendant should prescribe for common for his cattle levant and couchant, and aver that he put the cattle mentioned in the declaration, being his commonable cattle levant and couchant on his land, into the common, in case some of the cattle were not levant and couchant, it should seem the plaintiff should new assign the trespass, by saying that he brought his action for depasturing the common with other cattle, and not traverse the levancy and couchancy: for in trespass it is sufficient for the defendant to shew any thing which excuses the trespass, and the number mentioned in the declaration is not material." But the passage stood in the first edition, without any authority cited to support it, as an observation of the editor himself, and the case was added in a subsequent edition, as bearing upon, though not expressly involving, the point. If the position be good law, it applies equally to a plea in an action on the case by a commoner, in which, though for some time before the new rules, such defence would have been given in evidence under the plea of not guilty; yet formerly it used to be pleaded specially. (See the former part of the note.)

Now the precise number mentioned in the declaration being immaterial, the defendant was at liberty to apply his justification of right of common to any number of cattle that he pleased, and to aver that those cattle were levant and couchant, and that the supposed grievances with them were the grievances alleged in the declaration. The plaintiff, by his replication, admits the right of common set up by the defendant, and that the cattle in the plea are the same as those in the declaration, but traverses that all the cattle in the declaration were levant and couchant. This does not

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(a) Willes, 638.

(b) 1 Wms. Saund. 346 c, n. 2.



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make the precise number material; and as it was conceded that on every occasion some of the cattle were levant and couchant, the defendant is entitled to apply his plea to them both by way of allegation and proof at the trial, since he has asserted by his plea that those are the cattle mentioned in the declaration, and that assertion has not been denied. If the plaintiff had stated in his declaration, as he might have done, though he was not bound to do, that the defendant, being a commoner, had put in cattle which were not levant and couchant, and the defendant had asserted in his plea that they were levant and couchant, doubtless he must fail, unless he could prove by his evidence that all the cattle plaintiff proved to have been put on the common by him were levant and couchant. This also shews that the case of *Barnes v. Hunt* (a) does not apply, for there the licence pleaded was wholly inapplicable to all the trespasses proved on one particular day.

Such would have been the state of things if the replication had merely traversed that "the cattle in the plea mentioned," or "the said cattle," were levant and couchant; but the language of it is, that *all* the cattle in the declaration mentioned were not the defendant's own commonable cattle levant and couchant on his land.

On this replication a question arises, whether the word "all" alters the meaning of the issue tendered. The replication either means that none of the cattle mentioned in the declaration were levant and couchant, or it means that some were and some were not. Now, if it means the former, it is properly taken as an issue concluding to the country, for such is unquestionably the meaning of the plea, and the issue can only be properly taken by pursuing the meaning of the plea. Again, this would cause no inconsistency in the plaintiff's pleadings, because he would only then be averring that defendant had no cattle levant and couchant which is the apparent meaning of the declaration.

(a) 11 East, 451.

But if the replication have the latter meaning, then it is faulty in two respects; first, that it traverses the plea in a sense manifestly not intended by the plea; and, secondly, that it asserts that some of the cattle in the declaration mentioned were levant and couchant on the defendant's premises, who had a right of common, and so shews that the action is brought in respect of cattle, for which it will not lie, and that the defendant is entitled to a verdict pro tanto, and yet not shewing for how much. This is absurd, and therefore the plaintiff is driven to say, that the word "all" is equivalent to a new assignment, and amounts to the same thing as if the replication had averred expressly that the action was brought *not* in respect of the cattle levant and couchant, but in respect of others that were not levant and couchant.

We think that the word "all," being in the replication quite ambiguous, must be taken most strongly against the party pleading, and that it must be taken that the traverse, concluding to the country, takes issue only on the allegations of the plea according to the meaning of that plea; consequently it does not amount to a new assignment, but is only a denial that any cattle of the defendant were levant and couchant; and the learned judge was right in telling the jury, that as it was admitted that in all the instances some of the cattle were levant and couchant, the verdict must be for the defendants, and the present rule must be discharged.

Rule discharged.

BLAND v. WARREN.

Wednesday,  
May 25th.

**ARCHBOLD** had obtained a rule in Easter term last, calling upon the plaintiff to shew cause why the trial had

in term, in K. B., at which none but undefended causes are taken, the defendant should either instruct counsel to appear to say that the cause is defended, or should give notice to the plaintiff of its being a defended cause.

2. When the Court of K. B. grant a rule to set aside the trial and the verdict, in a cause that has been taken as undefended, on an affidavit of merits by the defendant, it is not the practice to make the payment of costs by the defendant *on a particular day* a condition in the rule.

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1. Where notice of trial has been given for the last sittings

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and the verdict obtained in this cause should not be set aside for irregularity. In the affidavits on which the rule was obtained, it was sworn that issue was joined on the 31st March, and notice of trial given for the second sittings in Easter term, and continued to the third sittings. The defendant was applied to by the plaintiff on the 1st April to allow him to continue his notice until the sittings after term, but the defendant refused. The defendant was ready to attend the trial at the third sittings, and defend the action; but the sittings paper expressly stating that none but undefended causes would be taken at such sittings, the defendant had no idea that the same would be called on, the plaintiff's attorney knowing that the same would be defended. The affidavit then stated that the cause was called on as an undefended cause, and tried in the absence and without the knowledge of the defendant; that defendant had no notice that the cause would be brought on as an undefended cause; that the cause was set down out of its turn in the list of undefended causes. It was also stated that there was a good defence on the merits.

*Humfrey* now shewed cause, on affidavits stating "that the cause was set down in the regular way, and not out of its regular turn;" that when it was called on at the third sittings, no one appeared for the defendant to state that the cause was defended; and denying that the plaintiff's attorney knew that it would be defended.

*Archbold*, contra. It was not necessary that counsel should attend to say the cause was defended. If a plaintiff wishes to bring on a cause as undefended, he should give two days' notice to the other side, which has not been given here. It may be admitted that if the cause was not taken out of its turn, there is no irregularity.

Lord DENMAN C. J.—The practice is to make out a regular list in the marshal's office, for the last sittings in term, of the causes that are thought likely to be taken as

undefended. Formerly counsel used to be instructed to appear and say that the cause was defended, upon which it would go over to the sittings after term as a matter of course. Another mode of doing this was by notice being given by the defendant to the plaintiff that the cause would be defended. In this case the cause is set down in the list for the last sittings; no counsel was instructed to appear, and no notice was given that it would be defended. I think therefore no case of irregularity has been made out. As there is an affidavit of merits, there may, however, be a new trial on the payment of costs.

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v.  
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LITLEDALE and PATTESON Js. concurred.

*Humfrey* then applied to the Court to fix a day by which the costs should be paid, or otherwise the defendant would have the power of delaying judgment being signed till November, and intimated, that by the practice of the other Courts such orders had been frequently made.

LITLEDALE J.—It is not the practice of this Court: when an application is made to assimilate the practice of the Courts, it cannot be by an indirect motion like this.

Rule absolute on payment of costs.

WILKES v. OTTLEY.

May 23rd, and  
June 10th.

THE declaration contained the common counts in debt. The time for pleading was out on 20th May, and on that

the defendant on that day delivered several pleas, with a summons for leave to plead several matters, returnable at three o'clock on the 22nd (Monday); and the plaintiff returned the pleas, and signed judgment as for want of a plea;—the Court, under the circumstances, set aside the judgment on an affidavit of merits, without costs.

2. Pending a rule to set aside judgment that had been signed for want of a plea, the defendant obtained the order of a judge to plead several matters; but the Court set aside the order.

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day several pleas were delivered to the plaintiff's attorney, with a summons for leave to plead several matters, returnable at three o'clock on Monday, 22nd May. The plaintiff returned the pleas, and signed final judgment, at eleven o'clock on that day, as for want of a plea. On the 23rd *Tyrwhitt* moved for a rule to set aside the judgment on an affidavit of merits, and contended that payment of costs by the defendant should not be made part of the terms, on the ground that as the summons would have been a stay of proceedings had it been made returnable at the opening of the office on the 22nd (*a*), it was, at all events, enough to deprive the plaintiff of all right to the costs of a judgment signed under such circumstances. By the old practice, instructions to the clerk of the rules for a rule to plead several matters, had that effect (*b*). But the COURT (*c*) denied that any analogy existed between that case and the present, as the pleading several matters is now a matter of discretion in the judge before whom the summons for that purpose is heard, instead of being a matter of course, as before the new rules; but under the circumstances they granted the rule without costs, reserving the question, whether the plaintiff should have costs till cause was shewn. Pending that rule, the defendant's attorney took out a summons to plead several matters, which was opposed for the plaintiff, on the ground that no order to that effect could be made while the judgment was outstanding. The learned judge granted the order, but it was not drawn up or served on the plaintiff.

June 10th.

*Mansel* afterwards obtained a rule to set it aside for irregularity, with costs, on the ground urged before the judge. Both rules came on together. *Mansel* shewed cause against the first rule, which was made absolute without costs, with four days' time to plead.

*Tyrwhitt* shewed for cause against the second rule, that

(*a*) 1 Tidd, 470, 9th ed.  
 (*b*) 1 Tidd, 657, 9th ed.

(*c*) Lord Denman C.J., *Little-  
dale and Patteson Js.*

as the order of the learned judge had not been drawn up and served on the plaintiff, it was a mere nullity, or at least compelled no step by him pending the former rule, and might be even then abandoned by the defendant, *M<sup>r</sup> Dougall v. Nicholls* (a), in order to plead a single plea. *Joddrell v. —* (b) and *Sedgewick v. Allerton* (c) also shew that the order not being served on the plaintiff, he was not bound by it. The defendant obtained the order pending the first rule quia timuit, that had the judgment been set aside on the terms of pleading instanter, he might have only the day on which the rule was disposed of (d) to take the next step, of obtaining a summons to plead several matters. That summons would not be returnable in time to prevent the plaintiff from again signing judgment as for want of a plea. No such difficulty occurred under the old practice, as the signature of counsel was sufficient to obtain the rule to plead several matters. At all events, no costs are allowed where a judge's order is set aside: *Hargrave v. Holden* (e), *Wright v. Skinner* (f).

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*Mansel*, in support of the rule, urged that the defendant could not obtain this order in a cause which had arrived at judgment, so as to hold it in readiness to be acted on if the judgment was set aside.

Per CURIAM (g)—

Rule absolute to set aside the judge's order, without costs.

(a) 5 N. & M. 366; S. C. 3 A. *Hughes v. Walden*, 5 B. & C. & E. 813. 770, n.

(b) 4 Taunt. 253.

(e) 3 Dowl. P. C. 176.

(c) 7 East, 542.

(f) Tyr. & Gr. 69.

(d) See per *Abbott* C. J. in

(g) Lord *Denman* C. J. and *Littledale* J.



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Thursday,  
May 25th.

The Court of K. B. has no jurisdiction to direct the Court of Quarter Sessions to rehear an appeal, on the ground of their having rejected evidence which was admissible, although the appeal was against a conviction under the Game Act (1 & 2 Will. 4, c. 32), by which a certiorari is taken away.

### Ex parte PRATT.

**J. J. WILLIAMS** moved for a rule nisi for a mandamus to the justices of Berks, commanding them to enter continuances, and to hear certain evidence in an appeal of one *Thomas Pratt* against a conviction under the Game Act (the 1 & 2 Will. 4, c. 32). It appeared from the affidavits that an information had been laid before two justices against *Pratt*, for having trespassed, in search of conies, on lands in Bagley Wood, alleged to be the property of the President and Scholars of St. John's College, Oxford, and that *Pratt* was fined by them 2*l*. On an appeal against this conviction to the Berks quarter sessions, the appellant admitted shooting a rabbit, but tendered evidence to shew that no trespass had been committed, as Bagley Wood did not belong to St. John's College, but was part of the lord's waste of the hundred of Hormer and manor of Cumnor, and that he was a commoner. The sessions, however, refused to hear any evidence whatever on the point, and confirmed the conviction. They also refused to grant a case to this Court.

*J. J. Williams* now contended that such evidence was clearly admissible, since sect. 30 provides that the same evidence which might be given in an action of trespass shall be received; and as the certiorari was taken away by sect. 45, the Court would grant the writ, in order to prevent a failure of justice. In *Rex v. Justices of Carnarvon* (a), *Holroyd J.* said, "If it had appeared that the sessions had heard one side, and had altogether refused to hear the other, I should have thought it the same as if the case had not been tried at all; and I should then have been of opinion that this mandamus ought to issue." Now, in this case the refusal to hear the evidence, which offered a complete defence, is equivalent to hearing only one side.

Lord DENMAN C. J.—That case is against you as far

(a) 4 B. & Ald. 86.

as it goes; for there also the sessions refused to hear evidence that was tendered; and a mandamus to rehear the appeal was refused. Your motion is in fact for a new trial in the case, when we have no jurisdiction to grant one. The gist of your application is, that the sessions have made a mistake in point of law; but we have no power to correct any mistake they may make unless they think fit to send up a case for us, which they have not done.

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Ex parte  
PRAIT.

LITTLEDALE and PATTESON Js. concurred.

Rule refused.

**The KING v. The Justices of the North Riding of  
YORKSHIRE.**

Thursday,  
May 25th.

A Rule nisi had been obtained for a certiorari to the Court of Quarter Sessions of the North Riding of Yorkshire, to remove an order of bastardy, made by the said Court upon one *Michael Underwood*.

It is not necessary for the churchwardens or chapelwardens of a township to sign a notice of an application for an order of maintenance for a bastard child under the 73d section of 4 & 5 W. 4, c. 76, (the Poor Law Amendment Act).

The application for the order was made in behalf of the inhabitants of the township of Egton. The notice of the intended application was signed by the two overseers for the township. Egton is a perpetual curacy within the parish of Lyth, but it has its own church officers, who are called churchwardens, and who perform for the township all the duties usually executed by a churchwarden of a parish not divided into townships. Rates for the repair of the church are levied within the township, and marriages, baptisms, and funerals have always been performed in the church of Egton, but a small annual sum is contributed towards the repair of the parish church. Besides the two overseers of the township who had signed the notice there was also an assistant overseer; when the application was made to the sessions, it was objected that the notice was insufficient as it was not signed by a majority of the churchwardens and



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YORKSHIRE.First point:  
It was not  
necessary for  
the church-  
wardens of the  
township to  
sign the notice.

overseers. The affidavits on which the rule nisi was obtained did not state that there was an assistant overseer.

*Bliss* now shewed cause against the rule. The question is, whether this notice has not in fact been signed by a sufficient number of the parish officers of Egton. By s. 72 of the 4 & 5 W. 4, c. 76, (the Poor Law Amendment Act,) when any child shall be born a bastard, and shall become chargeable to any parish, the "overseers or guardians of such parish" are empowered to apply to the Court of Quarter Sessions, for an order on the putative father. The 73d section enacts, that no such application shall be heard, unless fourteen days' notice shall have been given under the hands of such overseers or guardians. The 109th section is the interpretation clause, and it enacts, that in the construction of the act, the word "overseer" shall be construed to mean and include overseers of the poor, churchwardens, so far as they are authorized by law to act in the management or relief of the poor, or in the collection or distribution of the poor rate, assistant overseer, or any other subordinate officer, whether paid or unpaid, in any parish or union, who shall be employed therein in carrying the act or the laws for the relief of the poor into execution. It is not the duty of churchwardens in all places to administer the law for the relief of the poor. In many acts of parliament they are distinguished from overseers, whose peculiar duty it is to execute the law for the relief of the poor. The 43 *Elizabeth* speaks of churchwardens or overseers. The 56 *Geo. 3*, c. 139, uses the word "overseer" alone. In the Reform Act, (2 W. 4, c. 45,) and likewise in the Municipal Corporation Act, (5 & 6 W. 4, c. 76,) the overseers have various duties to perform independently of the churchwardens. Egton appears only to be a township and not a parish, and the persons who have the management of the rate for the repair of the church are therefore chapelwardens and not churchwardens; the statute of *Elizabeth* only makes the churchwardens of a parish overseers; neither the 13 & 14 *Car. 2*, c. 12, nor any other statute,

authorizes the chapelwardens of a township to act as overseers. *The King v. Nantwich* (a) shews that neither the churchwardens of a parish which includes townships, nor the chapelwardens, have any right to interfere with the management of the poor.

But it was said at the sessions that at any rate the assistant overseer ought to have signed the notice. An assistant overseer is appointed by warrant, and he is only authorized to exercise such powers of an overseer as are expressed in his warrant; in this case the appointment of the assistant overseer was not produced, and it did not appear that he was authorized to act in cases of this description. But, assuming that the assistant overseer had full authority to sign the notice, and that it was not necessary for the chapelwardens to sign the notice, then a majority of the overseers, with the assistant overseer, have signed (b).

*S. Temple*, contra. Egton, though called a township, is in the nature of a parish. The statute of *Elizabeth* speaks only of parishes, but there are various statutes which speak of the churchwardens of parishes, townships, or places. In *The King v. Nantwich* (a), *Bayley J.* says, "the 8 & 9 *W. 3.* did not mean to interfere with the 13 & 14 *Charles 2.*, neither did the 17 *Geo. 2.* The words of the former are material to be considered, for it would seem from the use of the words, 'the churchwardens and overseers of any parish, township, or place, or the overseers of any other place where there are no churchwardens,' that the legislature considered that the word 'churchwardens' would apply to a township as well as a parish. Perhaps it may be inaccurate so to apply it, for there may be no instance of a church for a township, but still if there were a chapel within it, the legislature might think the word not inapplicable. The act therefore probably meant, that if there were persons within a township, exercising a similar function

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YORKSHIRE.Second point :  
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ant overseer to  
sign.

First point.

(a) 16 East, 228.

the Court did not give any opi-  
nion with respect to them.(b) Other points were raised in  
argument, but they are omitted, as

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to that of churchwardens, they should join." The last observation is applicable to this case. In *The King v. Nantwich* (a) it was held, that since the 13 & 14 Car. 2, c. 12, an indenture of apprenticeship executed by the overseers of a township which had no churchwardens or chapelwardens, was a valid indenture, although neither of the churchwardens of the parish at large within which the township was situate joined in the execution. [Lord Denman C. J. The whole point in that case was, that the churchwardens of the parish at large need not join. Has it ever been held that the churchwardens of a township are overseers?] Bayley J. seems to intimate that the persons who exercise the functions of churchwardens may be considered as overseers. *The King v. Nantwich* (a) is distinguishable from the present case, because in that case it was not shewn that there were any churchwardens or chapelwardens of the township. In the present case it is shewn that churchwardens are regularly appointed, and that there is a church, in which marriages, baptisms, and funerals are performed.

First point.

LORD DENMAN C. J.—One of the numerous answers given by Mr. Bliss in this case is decisive. Not only has a majority of the overseers signed this notice, but all of them have signed it. The statute of *Elizabeth* applied to parishes only. Then came the statute of *Charles*, which authorized the division of a parish where it was too large for the convenient management of the poor, but in that statute no reference is made either to churchwardens or chapelwardens. There are some subsequent statutes from which it might be inferred that the legislature thought that churchwardens had been appointed for all places where there are overseers. But even supposing, from the language of subsequent acts, the legislature may have thought that a power had been given to the churchwardens of townships, that is quite insufficient to invest chapelwardens with the powers and authority of overseers. It would be a difficult matter in many cases to determine what the chapelry is of

(a) 16 East, 228.

which the chapelwardens are to be overseers. It is infinitely more convenient to determine that the statute of *Car. 2* does not contemplate churchwardens of any township. This decision is not inconsistent with the judgment of *Bayley J.* in *The King v. Nantwich (a)*. In that case it was argued that it was necessary for the churchwardens of the parish at large to join. *Bayley J.* there says, "the act probably meant, that if there were persons within a township exercising a similar function to that of churchwarden, they should join. But it seems incongruous to hold that it meant that the churchwardens of a parish were to concur in granting a township certificate, for then the churchwardens, who are resident in township A., might have to certify that the pauper was settled in township B." That is not a decision that persons within a township, exercising a similar function to that of churchwardens, ought to join; but that it is not necessary for the churchwardens of the parish at large. However, it is quite clear that the observation, that the churchwardens of the township might be required to join, was unnecessary for the determination of the case. Another objection is, that the assistant overseer has not signed the notice; but that is answered by saying, we ought to see that there is an assistant overseer, and to know what his powers are, before we can determine that his signature is necessary.

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Second point.

LITLEDALK J.—Egton is not a parish, and the statute of *Elizabeth* speaks only of the churchwardens and overseers of a parish. The statute of *Charles* directs how overseers of any township are to be appointed, but it does not mention either church or chapelwardens. It is true that some acts of parliament speak of the churchwardens and overseers of the poor of any parish, township, or place, but those words may be construed to mean, the churchwardens and overseers of that parish, where there is a parish, and where there is a place maintaining its own poor, not a parish, the overseers of the poor of that place. We cannot say that it was necessary for the assistant overseer to have

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signed the notice, as we do not know there was one, or what his powers are.

PATTESON J.—I am entirely of the same opinion. This question arises on the construction of the 73d sect. of 4 & 5 Will. 4, c. 76; and in deciding it I wish to be distinctly understood as not expressing any opinion whether it is necessary that all the overseers should sign the notice. It is not requisite for the determination of this case to decide that point, because I am of opinion, that in the present case all the overseers have signed the notice. A similar point has been lately before the Court upon the construction of the 81st section (a).

Second point.

First point.

The question in this case is, who are the overseers of the township? It is said that the chapelwardens are. They cannot be if the chapelry is not co-extensive with the township. *The King v. Nantwich* (b) determined that the churchwardens of the parish at large cannot be the overseers of the township, nor do I think that the chapelwardens can be so considered, because the chapelry may not be co-extensive with the township. It is admitted that there is no decision to that effect, but it is said that there are statutes which treat the churchwardens of townships as overseers. The statute 9 Geo. 1, c. 8, speaks of the churchwardens and overseers of parishes, townships, and places, which may mean churchwardens and overseers of parishes, but overseers only of townships. Whatever may be the construction of the 9 Geo. 1, c. 8, s. 8, or of the 17 Geo. 2, c. 3, as to the mode in which the notices required by those acts should be signed, they do not make the churchwardens of a township overseers of that township; there are therefore no overseers of this particular township except those who have signed the notice and the assistant overseer, and it was incumbent on the appellants to show that he had authority to sign it.

Rule discharged (c).

(a) *Rex v. Justices of Derbyshire*, (b) 16 East, 228.

1 N. & P. 703.

(c) *Williams J.* was in the Bail Court.

1837.

*Saturday,  
May 27th.*

**The KING v. The Inhabitants of MISTERTON.**

ON appeal against an order of removal, whereby *John Wood* and his wife were removed from the parish of Stowe, in the parts of Lindsey, in the county of Lincoln, to the parish of Misterton, in the county of Nottingham, the Court of Quarter Sessions confirmed the order, subject to the opinion of the Court of King's Bench upon the following case:

The pauper was removed from Stowe to Misterton on the 13th October, 1834, and pursuant to and as prescribed by the statute, a copy of the order, examination of the pauper, and notice, was sent to the appellants, and filed at the sessions, according to the practice thereof. The words of the said examination, so far as relate to any settlement of the pauper, were as follows:—"The pauper saith that he is 23 years of age, and was born at Gainsbro', and that at Gainsbro' statutes, before May-day, 1829, he was hired by *Mr. David Parkinson*, of Thonock, in the said parts, farmer, to serve him for a year, from May-day, 1829, to May, 1830, for 3*l.* 10*s.* wages; that he went into his service at Thonock at May-day, and when he had been there about a fortnight, his master informed him that the servant of his mother, *Mrs. Parkinson*, of Misterton, in the county of Nottingham, did not suit her, and asked him if he had any objection to change places with *Mrs. Parkinson's* servant, and go and live with her instead of him; that the pauper said he had no objection, and without having any fresh agreement, he

On the removal of a pauper, a copy of his examination was sent with him, which stated as follows:—That before May-day, 1829, he was hired by *D. P.* of T., to serve him for a year, from May-day, 1829, to May-day, 1830, for 3*l.* 10*s.* wages; that he went into his service at T. at May-day, and when he had been there about a fortnight, his master informed him that the servant of his mother, *Mrs. P.* of M., did not suit her, and asked him if he had any objection to change places with *Mrs. P.'s* servant, and go and live with her instead of him; that the pauper said he had no objection, and without having any fresh agreement, he went to M. and served the remainder of his year's service with *Mrs. P.*, and at the end of the year received of her 3*l.* 10*s.*, the amount of his wages. The notice of appeal stated, that the pauper did not, in fact, gain a settlement in M., by reason of having served first *D. P.* for a fortnight at T., and afterwards the mother of *D. P.* in M. for the remaining part of the year, under the circumstances stated in the examination of the pauper, upon which the order of removal was grounded, and that the contract of service with *D. P.* was dissolved on the pauper leaving the same. It was held, that the respondents, at the sessions, could not give evidence to shew that *D. P.* hired the pauper as the agent of his father; that the latter died shortly after May-day, 1829, and that the pauper served out the remainder of his year with his widow, at M., and received his wages; for though not inconsistent with the hiring stated in the examination, they were new facts to the appellants, which they were not prepared to contest.

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of an appeal against an order of removal, the respondent parish are not allowed to give evidence of any other ground of removal than those set forth in the order of removal, or the examination of the pauper. All that was intended by that provision was, that the respondent should not set up any other settlement than that stated in the examination. In *The King v. Kelvedon (a)*, in the copy of the examination sent by the respondent parish, it was said that the pauper stated that his father belonged to the parish of A., and that he had done no act to gain a settlement. It was held that the respondent parish might prove any species of settlement in the pauper's father in A. It was said when the appeal was tried, that the evidence in this case shewed a different settlement to that contained in the examination. That however is not the case, it simply explained and made the examination intelligible. Surely the respondents may be allowed to give other evidence, besides that which is stated in the examination, in order to remove any ambiguity.

*Whitehurst* contra. According to the examination, the pauper had gained no settlement whatever, and the appellants alleged, according to the facts stated in the examination, that no settlement was gained. It would be exceedingly unjust to the appellants to permit the respondents at the trial of the appeal to give in evidence a different series of facts to that stated in the examination. If the facts on which the removal proceeded had been generally stated, probably no objection would have been made. But as they are set forth in detail, the respondents must be bound by the statement. In *The King v. Holbeach (b)*, the examination of the pauper stated a settlement by hiring and service, in Spalding, and the ground of appeal stated by the appellants in their notice was, that the pauper had stipulated for two days' holiday, at Spalding club-feast. It was held, that it was not open for them to prove a stipulation for one

(a) 1 N. & P. 138.

(b) 1 N. & P. 137, 138.

day's holiday at Holbeach fair. Lord Denman C. J. in that case said, "It is very easy to imagine a case of this sort, where a notice might be given fraudulently, with a view to mislead, and yet a very slight difference in the proof be tendered to that specified in the ground of appeal." (Here he was interrupted by the adjournment of the Court.)

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*Cur. adv. vult.*

LORD DENMAN C. J. (on June 7th) delivered the judgment of the Court.—We need not hear Mr. *Whitehurst* further. It is a case in which a pauper has been removed, with a copy of his examination, which stated that he had been hired by a Mr. *Parkinson*, and had afterwards served with a Mrs. *Parkinson*. On that statement notice of appeal was given, and the appellants stated as a ground of appeal, that no settlement appeared on the examination, which is obviously true. When the respondents came to the sessions, they sought to give in evidence another state of facts, not indeed inconsistent with those set forth in the examination, but of which the appellant had no previous information. They proposed to shew that the *David Parkinson*, mentioned in the examination, had acted as the agent of his father, and therefore that the service with his mother was a continuance of the original service, which certainly would make a good settlement. But we are all most clearly of opinion, that when the appellants have taken issue on the sufficiency of the settlement, as stated in the examination, it is not competent for the respondents to introduce a new state of facts, which, if they had been communicated, would have induced the appellants, if they had found them to be true, either not to appeal or to be prepared with evidence to meet them. It is quite clear, that under the late act, such an alteration of the examination is quite inadmissible.

Order of Sessions quashed.



1837.

Wednesday,  
May 31st.

The declaration alleged that defendant was indebted to *J.* in 200*l.*, and that a commission of bankruptcy issued out against defendant, and that in consideration that *J.* would prove for this 200*l.* against the estate of defendant, the defendant promised to pay him the said 200*l.* after the delay of a few months. Judgment was arrested, after verdict for the plaintiff, on the ground that the promise was void for want of a consideration.

JOHN BREALEY, surviving Assignee of WILLIAM JOY, a  
Bankrupt, v. ANDREW.

**ASSUMPSIT.** The first count of the declaration (which was before the New Rules) stated "that the defendant theretofore and before *Joy* became a bankrupt, and before and at the time of making the promise thereafter next mentioned, to wit, on &c., was indebted to *Joy* in 200*l.* for money received by the defendant for the use of *Joy*: that also theretofore and before the making the said promises thereafter next mentioned, to wit, on &c., a certain commission of bankruptcy had been and was issued against the defendant, and thereupon the defendant, to wit, on &c. (after his bankruptcy), in consideration of the premises and that *Joy* would prove the said sum of 200*l.* against the estate of the defendant, under the commission of bankruptcy, the defendant promised *Joy* to pay him the said sum of 200*l.* after the delay of a few months. Averment, that although a long time, to wit, five years, hath elapsed since the said promise, and although *Joy* did afterwards, to wit, on &c., prove the said sum of 200*l.* against the estate of defendant, under the said commission of bankruptcy, the defendant had disregarded his promise. There were also counts for goods sold, money lent, money paid, and on an account stated with *Joy* before he became a bankrupt.

Pleas—1st, General issue: 2nd, That after the making the supposed promises, the defendant became a bankrupt: 3rd, A set-off.

At the trial at the sittings in London after Michaelmas term, 1835, before *Patteson J.*, the plaintiff obtained a verdict for 184*l.* 14*s.* 9*d.*, with liberty to reduce the damages to 9*l.* 14*s.* 9*d.* on the count for goods sold, and to enter a verdict for the defendant on the first count as against evidence.

*W. H. Watson*, in the ensuing Hilary term, having obtained a rule nisi to reduce the damages to 9*l.* 14*s.* 9*d.*, or



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*W. H. Watson*, contra, did not appear.

LORD DENMAN C. J.—I am sorry Mr. *Watson* is not here, as upon part of his rule we must decide against him (*a*). But on the motion in arrest of judgment, it appears to me to be quite clear that the first count is bad; for the only mode of supporting such a contract would be by importing a number of facts into the declaration which nowhere appear. The count states that the defendant was indebted to *Joy* in 200*l.*, and that afterwards the defendant became a bankrupt; and that in consideration that *Joy* would prove that debt against the defendant's estate, the defendant promised to pay him the 200*l.* That promise being made out in evidence, the question is, can it be supported? I think it cannot; for there is no consideration for it whatever, being made by a bankrupt to pay a debt for which he was in no way liable.

LITLEDALE J. concurred.

PATTESON J. (*b*)—I will not decide, if the promise had been made in the way put by Sir *F. Pollock*, viz. on the waiver of a tort by *Joy*, whether it would have been good or not; and it is not necessary to inquire, for the question really does not arise on the present record.

Rule absolute to arrest the judgment on the first count, and to enter the verdict for 9*l.* 14*s.* 9*d.* on the second count; discharged as to the rest of the rule.

(*a*) On the fact of there not being sufficient evidence at the trial to support the promise on the count for goods sold.

(*b*) *Williams J.* was in the Bail Court.

## FIELD and another v. WOODS.

1837.

Thursday,  
June 1st.

**ASSUMPSIT** on a banker's check, drawn by the defendant on the 12th June, 1835. Plea, that the defendant did not make the said draft or order in the declaration mentioned, modo et formâ. At the trial before *Williams J.*, at the sittings in Hilary term, 1836, the check was put in and read without objection: the defence was, that the check was post dated, and therefore required a stamp. It was objected that this defence should have been pleaded. The learned judge reserved the point, and the verdict passed for the plaintiff. *Payne* having obtained a rule nisi accordingly for a new trial,

In an action on a banker's check, where the instrument was put in and read without objection, but it afterwards appeared that it was post dated,—It was held that, being unstamped, it could not be given in evidence, and that the objection need not be taken on the first production of the check.

Secondly, that the fact of the check being post dated need not be pleaded specially.

First point: The objection was not taken until after the check was read.

*Channell* now shewed cause. The want of a stamp operates differently in different instruments. In some it prevents their being read in evidence; in others (as an indenture of apprenticeship, where the consideration is not truly stated) it makes them void altogether. A check of this kind belongs to the first class, which is not rendered invalid by the want of a stamp, but merely cannot be given in evidence. It is admitted that in a certain class of cases the objection is fatal, if made on the production of the instrument: for example, in an action against the acceptor of a bill of exchange, where the plea is non-acceptance, the plaintiff must prove the acceptance, and produce the instrument; and if it then appear that the stamp is improper, the Court cannot take notice of the bill. So also in the case of an action against the drawer or the indorser of a bill. But in this case, on the check being produced, the defect would not be apparent. The Court could not tell, on inspection, that the check was post dated; and it is therefore unlike the case of a deed being produced, where the stamp should be in proportion to the number of words, and where the Court, by counting (that is, by mere inspection), may ascertain whether the stamp is proper or not. If the objection could be taken at all under the plea that the defendant did not draw the check, it could

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only have the effect of preventing it from being given in evidence under 31 *Geo. 3*, c. 25, s. 19; but this check was given in evidence without objection. The objection was not made therefore at the proper time. In a case in this Court, where a new trial was moved for on the ground of an instrument not having the proper stamp, the rule was refused, as the objection was not taken at *nisi prius*. [*Patteson J.* You admit that the objection may be taken in an action on a bill of exchange; but here the declaration is on a banker's check, and the plea is, that the defendant did not make the check. Now the evidence shews it to be a bill of exchange; for the statute does not state that a check post dated shall have a stamp, but that it shall be considered as a bill of exchange (a).] There is a difficulty certainly in meeting this view of the case; but it is submitted, that by the New Rules nothing can be given in evidence under the defendant's plea, but the fact of his not having given the check in question. The penalty for issuing post dated checks is 100*l.*, by the 55 *Geo. 3*, c. 184, s. 12. It may be said, therefore, that the defence set up, shews a contract in contravention of law, and therefore it should have been pleaded. In *Allen v. Keeves* (b) and *Whitwell v. Bennett* (c), it was held, that a banker's check post dated was void; but in *Upston v. Marshall* (d) and *Williamson v. Garratt* (e) it was held, that if a check bears a date, that date must be considered to be the time to which the schedule of 55 *Geo. 3*, c. 184, refers. The effect of those cases therefore is to overrule the previous decisions. If therefore a bill of exchange post dated can be received in evidence, as appears from *Williamson v. Garratt* (e), it is difficult to see why a check post dated should not.

Second point:  
 The post dating  
 of the check  
 should have  
 been pleaded.

First point.

*Payne*, *contrà*. The objection here is, that the plaintiff has shewn a defect in his title; and the rule is, as soon as it appears to the judge trying the issue that evidence has been

(a) 55 *Geo. 3*, c. 184.

(b) 1 *East*, 435.

(c) 3 *B. & P.* 559.

(d) 3 *D. & R.* 198; *S. C. Upstone v. Marchant*, 2 *B. & C.* 10.

(e) 2 *N. & M.* 49; *S. C. Williams v. Jarrett*, 5 *B. & Ad.* 32.

received which is not admissible, he will strike it out; *Jones v. Fort* (a). *Williamson v. Garratt* (b) differs from this case, as the question there was merely whether the stamp was sufficient; but *Allen v. Keever* (c) is quite identical with the facts here.

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As to the defence being pleaded, *McDonall v. Lyster* (d) Second point. and *Dawson v. Macdonald* (e) clearly shew that it need not.

LORD DENMAN C. J.—I do not see how it is possible to distinguish this case from the two last cited. Here is an instrument which on the face of it is good, but which, on the evidence produced, appears to require a stamp. *Dawson v. Macdonald* (e) was a case where the defendant, who was sued as acceptor of a bill of exchange, wished to plead that the bill was improperly stamped; and Parke B. said, “the only consequence of the wrong stamping is, that the instrument cannot be given in evidence. Allowing such pleas as this only raise doubts at the bar where none really exist.” First point.

LITLEDAL J.—I had some doubts at first whether Mr. *Channell* was not right, as the 31 Geo. 3, c. 25, is not mentioned in 55 Geo. 3, c. 184; but upon looking at the latter statute, I think the words are sufficiently large to include this case. The words in the schedule, under “Bill of Exchange,” shew First point. that a bill of exchange, as this is, requires a stamp. Then there is an exemption for all drafts or orders for the payment of money to the bearer on demand, provided the same shall bear date on or before the day when the same shall be issued. But this instrument did not bear date on or before the day when it was issued, and therefore it is not within the exemption. Then the 31 Geo. 3, c. 25, enacts that no bill of exchange shall be given in evidence unless it is duly stamped. It appears in point of fact that the instrument was read. Certainly the late practice at nisi prius has

(a) 1 Mood. & Malk. 196.

(c) 1 East, 435.

(b) 2 N. & M. 49; S. C. *Wil-*

(d) 2 M. & W. 52.

*liams v. Jarrett*, 5 B. & Ad. 32.

(e) 2 M. & W. 26:

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been, that if once a document is read, it has not been allowed to be struck out of the judge's notes. But there is a difference between those cases, where the defect appears at once, as on a bill of exchange, or a deed having more than the right number of words, and this, where the defect is not at once visible. Here the objection could not be raised till the defect was pointed out by extrinsic evidence, or, if raised, could only have been *de bene esse*; and therefore I think the objection need not have been made on the first production of the instrument. The cases in the Exchequer are certainly not distinguishable from the present.

First point.

PATTESON J.—I cannot doubt that the 55 Geo. 3, c. 184, incorporates the 31 Geo. 3, c. 25, so as to raise this question. Sect. 19 of the latter act provides that no bill of exchange, liable to be stamped as directed by that act, shall be pleaded or given in evidence, or admitted to be available in any court, unless duly stamped. Now this check was not given in evidence; it was only *prima facie* evidence; and the reason why it is not evidence is, that the 55 Geo. 3, c. 184, schedule, directs that every bill of exchange, draft or order to the bearer, of any sum of money, shall bear a stamp; and then certain exemptions are stated. In order therefore to take this draft out of the enacting provision, it should be shewn to come within the exemption. It clearly does not. Therefore the circumstance of the instrument being read, clearly does not satisfy the provisions of the 31 Geo. 3, of its being "given in evidence." Being so, is it necessary that these facts should be pleaded?

Second point.

There is nothing in the New Rules to require it. The defence is not in confession and avoidance, admitting that it was a good contract, but says that it is altogether void in law. I cannot distinguish it from *M'Dowall v. Lyster* (a).

Rule absolute (b).

(a) 2 M. & W. 52.

(b) *Williams J.* was in the Bail Court.

1837.

Saturday,  
June 3d.

The KING v. NEWTON, HUNT, and others.

AN indictment having been found at the Middlesex sessions against the defendants, for a conspiracy, the defendant *Hunt* obtained a writ of *certiorari*, to remove the indictment into this Court, having entered into the necessary recognizances pursuant to 5 & 6 *W. & M.* c. 11, 8 & 9 *Will.* 3, c. 33, and 5 & 6 *Will.* 4, c. 33.

*M. Chambers* now moved for a rule, calling upon the defendant *Hunt* to shew cause why a procedendo should not issue, unless the other defendants should appear and plead during the present term, and take short notice of trial for the sittings after this term; and he contended, that as by the practice of the Court the other defendants could not be pressed on to take their trial at the same time as *Hunt*, there would be a necessity for two trials. [*Littledale J.* The indictment is removed against all the defendants.] But *Hunt* alone has entered into the necessary recognizances, great delay therefore will be created.

When one of several defendants has removed an indictment for conspiracy into K. B. by *certiorari*, and he alone has entered into the necessary recognizances, the Court will not award a writ of *procedendo*, or impose terms as to the other defendants taking short notice of trial, although by the practice of the Court, the trial could not be pressed on against the other defendants, and great delay would probably take place.

The COURT (a), after conferring with the officers of the Crown Office, stated, that the only instance in which time had been imposed on a defendant, who had removed an indictment by *certiorari*, was in *Rex v. Hunt* (b), which was under very special circumstances, and could not be made the foundation for introducing a new practice.

Rule refused.

(a) Lord Denman C. J., *Littledale* and *Patteson* Js.

(b) 3 B. & Ald. 444.



1837.

*Saturday,  
June 3d.*

In an action on a covenant to keep premises in repair during the tenancy, the jury may take into consideration the state of repairs at the commencement of the demise, in order to assess the damages for which the defendant is liable.

Sir FRANCIS BURDETT, Bart. v. WITHERS.

**ASSUMPSIT** on a special agreement for a lease, by which the defendant promised, during the tenancy, "to keep all the said premises, of every description, in good and sufficient repair, at his own expense." Breach, in the words of the covenant. Plea: payment of 5*l.* into Court, and non damnificatus ultra.

At the trial, before *Alderson B.*, at the Spring assizes, in 1836, at Reading, it was proved, on the part of the plaintiff, that repairs to the amount of 100*l.* were requisite to the premises which the defendant had held under the plaintiff. Evidence was then tendered on the part of the defendant, to shew what was the state of the repairs at the commencement of the tenancy; but his lordship rejected it, and said that the agreement, as stated on the record, was admitted, and that the only question for the jury was, to say what it would cost to put the premises into tenantable repair. The jury found for the plaintiff, with 100*l.* damages.

*Cooper* having obtained a rule nisi for a new trial, for a misdirection;

*Ludlow Serjt.* now shewed cause. The case of *Gutteridge v. Munyard(a)*, certainly seems against the plaintiff; yet in *Stanley v. Towgood(b)*, it was objected, that on a covenant of this kind, *Bolland B.* had told the jury it was unimportant what was the state of the repairs at the commencement of the demise; but *Tindal C. J.* and the Court of Common Pleas held, that under a covenant to keep and leave premises in repair, the state of repair at the time of the demise is not to be taken into consideration. The only question in this case was, what was the amount of damages.

Lord DENMAN C. J.—We cannot say that, for if the state of repairs, at the commencement of the tenancy, had been taken into consideration by the jury, the verdict might

(a) 7 C. & P. 129.

(b) 3 Bingh. N. C. 4.

have been for the defendant, as the defendant may have paid into Court more than he was liable for.

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LITLEDALE, PATTESON and WILLIAMS Js. concurred.

Rule absolute.

*Cooper* was to have supported the rule.

DOR on the several demises of ANN LEEMING and MARY  
LEEMING v. ANN SKIRROW.

Monday,  
June 5th.

**EJECTMENT** for land at Melling, in the parish of Wray. At the trial, at the Lancaster Spring assizes, 1836, before *Parke* B., the lessors of the plaintiff put in deeds of lease and release dated, February, 1827, made between *John Skirrow* and *Ann* his wife (the defendant), of the one part, and *John B. Leeming*, (the husband and father of the lessors of the plaintiff), of the other part, by which *John Skirrow* conveyed the land in question to *John B. Leeming* in fee, for the consideration of 400*l*. The release contained a covenant by *John Skirrow* to levy a fine to bar his wife's dower. On the execution of this deed, it appeared that *Ann Skirrow*, the defendant, made some objection about signing it, whereupon a verbal arrangement was made that *John Skirrow*, her husband, should hold the land "while" he or *Leeming* lived, upon which she executed the deed. *John B. Leeming* died in May, 1833, and on the 4th August, 1834, *Ann Leeming* gave *John Skirrow* notice to quit on the 14th February, 1835, (the customary time of quitting grass land in that country). *John Skirrow* died on the 24th February, 1835, never having paid rent or interest during his lifetime, and the action was brought against the widow. The lessors of the plaintiff claimed under the will of *John B. Leeming*. The defendant set up a mortgage of the land in question to a Mr. *Marshall*, in 1816, to which it appeared that *John B. Leeming* was privy. It was contended that this defence could not be set up, as the defend-

*J. B.* conveyed Blackacre in fee to *L.* in 1827, and the wife of *J. B.* was a party to that deed. It was agreed at the time of executing the conveyance, that *J. B.* should continue to occupy till he or *L.* died. *L.* died, and his heir gave *J. B.* notice to quit. A few days after the notice to quit expired, *J. B.* died, and his widow continued in possession. On ejectment brought by the heir against the widow,—Held, that she could not set up a prior mortgage of Blackacre by *J. B.*, for her possession accrued through *J. B.*, and therefore she was estopped by the conveyance of 1817.

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ant having come in under *J. B. Leeming*, she could not dispute her landlord's title. *Purke* B. was of opinion, that as the conveyance to *Skirrow* was fully proved, the plaintiff was entitled to a verdict, as the possession of the wife accrued through the husband; but that the case did not stand there, as there was an agreement by which the husband was to retain possession during the life of himself or *Leeming*; and as the defendant retained possession after her husband's death, she must be considered to have received possession through him, and that it did not come within *Cornish v. Searell* (a), which was cited for the defendant. His lordship accordingly directed a verdict for the plaintiff, with leave to enter a nonsuit. *Alexander* having obtained a rule nisi accordingly,

*Cresswell* now shewed cause. The case of *Cornish v. Searell* (a) is inapplicable, for it would tend to show that *John Skirrow*, the husband, might have set up the prior mortgage. But as against him, it is impossible to conceive a more perfect estoppel than that contained in the deeds of lease and release. In *Cornish v. Searell* (a) the tenant was in possession under a lease, and a sequestration out of Chancery was afterwards sued out against his landlord; the tenant signed an instrument, by which he agreed to attorn and become tenant to two of the sequestrators named in the writ; but he never paid them rent, and they were not entitled to turn him out of possession. The Court held, that as he had not received possession from the sequestrators, and as they had no legal title, he was not estopped by the agreement. Now what is the title of the wife? It appears she objected to signing the release, upon which an arrangement was made for her husband to occupy rent free. She also joined in the deed. That need not be relied upon. But according to the case of *Doe v. Perkins* (b), where the continuance in possession by the son of a lessor for life, after his father's death, was held to be no disseisin, so the continuing in possession by the defendant here could not

(a) 8 B. & C. 471.

(b) 3 M. & S. 271.

give her a new title as a disseisor; she therefore received possession from her husband, and is estopped by his acts.

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*Addison* contra. Neither the defendant nor her husband obtained possession through *J. B. Leeming*. *Cornish v. Searell* (a) therefore is applicable. The principle deducible from that case is, that if a tenant is in possession before the title of the party claiming as landlord accrues, he may dispute his landlord's title. There was no doubt here where the legal title was, for the mortgage was in 1816, and the conveyance under which the lessors of the plaintiff claim was in 1827. It was also proved that *Leeming* knew of that mortgage; it may be a question, therefore, whether the husband even would have been estopped. But supposing he were, that is no estoppel to the widow. Estoppel is by contract, and it is admitted on the other side, that her executing the release is not relied upon. As to *Doe v. Perkins* (b), it has been said to have been much doubted.

LORD DENMAN C. J.—We acted upon that case very lately (c). It appears clearly that the defendant was in possession by the sufferance of those who had power to turn her husband out, for his right to possession ceased on *Leeming's* death, and she received possession through her husband.

LITLEDALE J. concurred.

PATTESON J.—It is quite clear that the defendant came in under her husband, and that her husband was bound by the deeds of conveyance. There is therefore an estoppel against her.

WILLIAMS J. concurred.

Rule discharged.

(a) 8 B. & C. 471.

(b) 3 M. & S. 271.

(c) *Doe v. Gregory*, 4 N. & M. 308; S. C. 2 A. & E. 14. See *Doe v. Chawner*, post.



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*Monday,  
June 5th.*

The defendant was a surety by bond to the plaintiff for the due performance of a contract by S. according to a certain agreement. By that agreement S. was to complete the works for a certain sum, and payment was to be made to him by the plaintiffs, during the continuance of the work, by instalments, viz. three-fourths of the cost of the work certified to have been done every two months, and the remaining one-fourth one month after the whole was completed. S. applied for and received advances from the plaintiffs exceeding in amount the value of the work done by him, for some of which advances he gave security. The work not being done at the specified time, the plaintiffs called in another builder to complete the work, and the amount paid to him, added to the advances made to S., greatly exceeded the original contract price, but, added to the value of the work done by S. was something under the contract price. In an action against the surety on the bond, to which there was a plea of non est factum,—Held, first, that the defendant might shew in reduction of damages, that the advances were made by the plaintiffs not according to the contract, and that as the work had been completed within the contract price, the plaintiffs were only entitled to nominal damages; and, secondly, that it would have been improper to plead non damnificatus.

WARRE and another, Executors of THOMAS WARRE, v.  
CALVERT, Administrator of RICHARD LAYCOCK.

**DEBT** on a joint and several bond in the sum of 5000*l.* given by one *Richard Laycock*, deceased, and another, to *Thomas Warre*, treasurer of the London Dock Company, deceased. Plea, non est factum. The replication contained a suggestion of breaches, setting out the condition of the bond for the performance of certain works for the Company by *Streather*, and the agreement of 29th September, 1829; that *Streather* commenced the works; that the time for performing them had been enlarged, and three months additional time had been granted with the consent of the sureties; that the Company advanced to *Streather* from time to time, in respect of the said contract, 48,155*l.*, and assigned for breach that *Streather* did not complete the works at the time, and that the Company were obliged to complete them by another person, and thereby incurred the additional expense of 20,562*l.*

This action arose out of the non-performance of a contract made by one *Streather*, a bankrupt, with the London Dock Company, in consequence of which the Company sustained a heavy loss. The bond in question had been given by *Laycock* and another, as a security for the performance of the contract by *Streather* to *Thomas Warre*, Esq., the treasurer of the Company, and the condition of it was as follows: "If the said *Robert Streather*, his executors, &c., do and shall well and truly observe, perform, fulfil, and keep all and singular the covenants, promises, articles, clauses, agreements, matters, and things

mentioned and contained in a certain instrument in writing, bearing date the 29th September, 1829, purporting to be an agreement or contract made with *James Warre, Esq.*, treasurer of the London Dock Company, for and on behalf of the said Company, by the said *Robert Streather*, which on the part and behalf of the said *Robert Streather*, his executors, &c. were and ought to be observed, performed, fulfilled, and kept, according to the true sense, intent, and meaning of the said agreement or contract, that then the said obligation should be void and of no effect, &c.

The agreement of 29th September, 1829, was made between *Robert Streather* of the one part, and *James Warre*, on behalf of the Company of the other part, whereby *Streather* agreed to execute and perform, in a substantial and workmanlike manner, the whole of the works required in the formation of an entrance from the river at Shadwell to the Eastern London Dock, the works to be completed within twelve months from the time of commencement, in consideration of the sum of 54,200*l.*, and of the old materials on the premises.

By a statement of the case laid before the Court by consent of the parties, it appeared that the material parts of the agreement were as follows:—"That the engineer (of the Company) should be the sole judge of the said works and every part thereof being executed and performed agreeably to the plans and specification, and have the power of rejecting at any time any materials or work which in his opinion should not be conformable thereto; and to provide other materials in lieu of those rejected, and employ competent persons to perform the work, if the said *Robert Streather* should fail so to do, in which case the cost or amount thereof should be deducted from the sum to become due and payable to him under that contract. That the directors were to be at liberty to alter the plans, and thereby add to or diminish any part of the intended works, without prejudice to or making void the contract, in which case a proportionate addition or deduction should be made to or from the sum to be paid to the said *Robert*

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*Streather*, the amount of such addition or deduction to be computed according to the schedule of prices contained in this specification. And the said *James Warre* thereby undertook and agreed, for and on behalf of the Company, to pay to *Robert Streather* the said sum of 52,200*l.* by the following instalments, upon the production in each case of a certificate signed by the Company's engineer; viz., three-fourths of the cost of the work certified to have been done every two months; the first instalment to be paid whenever the engineer should certify that the portion of the work performed amounted in value to one-eighth part of the whole, and the remaining one-fourth within one month after the full completion of the contract."

At the trial before Lord *Denman* C. J. at the sittings in Guildhall after Michaelmas term, 1835, the following facts were given in evidence. *Streather* commenced the works on the 28th December, 1829, and in December, 1830, when the twelve months expired within which the works should have been completed, *Streather* applied to the Company for an extension of the time, and an agreement was entered into between the Company, *Streather*, and his sureties, to extend the time for three months, viz. until the 28th March, 1831. Soon after the commencement of the works in 1829, *Streather*, before he was entitled to any payment, according to the terms of the contract, applied to the Company for an advance of money, which the Company advanced him, and continued from time to time to make similar advances, some of which were expressly made by way of loan, and when the contract expired on the 28th March, 1831, the Company had advanced to him the sum of 49,169*l.* On that day, the works not having been completed, the Company gave notice to *Streather* and the sureties, that *Streather* could not be permitted to finish the works. The value of the works done by *Streather* up to the 28th March, amounted to 36,429*l.*, of which 4140*l.* was for extras and deviations from the original plan, and a deduction from the original contract

price for some works omitted was to be made of 408*l.* The Company employed one *M'Intosh*, to finish the works at an expense of 18,875*l.* The plaintiffs claimed a balance of 7705*l.* 7*s.* 9*d.* from the defendants in their particulars of demand, according to the following account.

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|                                                                                                                                                 | £      | s. | d. |
|-------------------------------------------------------------------------------------------------------------------------------------------------|--------|----|----|
| Payments made to <i>Streather</i> on account of the contract<br>(particularizing the amounts and times) . . . . .                               | 49,619 | 5  | 0  |
| Amount of monies paid by the Company in finishing the<br>works left unperformed by <i>Streather</i> . . . . .                                   | 18,875 | 3  | 2  |
| Expense to the Company of the works contracted to be<br>performed by <i>Streather</i> . . . . .                                                 | 68,494 | 8  | 2  |
| Deduct first, value of engine, &c. left by<br><i>Streather</i> on the premises . . . . .                                                        | 4857   | 3  | 9  |
| Deduct second, value of works<br>performed by <i>Streather</i> under<br>his contract, extra those in-<br>cluded in the contract price 4140 13 6 |        |    |    |
| Value of deductions from<br>works included in the con-<br>tract price . . . . .                                                                 | 408    | 16 | 10 |
|                                                                                                                                                 | 3731   | 16 | 8  |
|                                                                                                                                                 | 8,589  | 0  | 5  |
|                                                                                                                                                 | 59,905 | 7  | 9  |
| Contract price . . . . .                                                                                                                        | 52,300 | 0  | 0  |
| Loss to the Company by the non-performance by <i>Streather</i><br>of his contract . . . . .                                                     | 7,705  | 7  | 9  |

In March, 1831, *Streather* committed an act of bankruptcy, and a commission of bankruptcy was issued against him on the 21st April following :—It was contended for the plaintiffs, that as the defendant's testator was surety for the performance by *Streather* of his contract, the plaintiffs were entitled to recover against the defendant what they might have recovered from *Streather*. It was contended for the defendant, that the agreement was to be construed strictly, that as the value of the work done by *Streather* was only 36,000*l.* odd, he was only entitled to three-fourths of it, viz. to 27,000*l.*, or at all events to not more than the total value, and therefore the Company might have secured



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themselves against loss; and that as far as the sureties were concerned, the work had been completed by *M<sup>c</sup>Intosh* for less than the contract price; viz.

|                                         |                                  |         |
|-----------------------------------------|----------------------------------|---------|
| Value of work done by                   | Original contract price          | £52,200 |
| <i>Streather</i> . . . £36,429          | Extra work not in contract . . . | 3,731   |
| Value of work done by                   |                                  |         |
| <i>M<sup>c</sup>Intosh</i> . . . 18,875 |                                  |         |
|                                         | £55,304                          | £55,931 |

And *Law v. East India Company (a)* and the former proceedings of the Company in the case of *Streather, Crowfoot v. The London Dock Company (b)*, were relied upon. The Lord Chief Justice thought that the Company had no claim against the defendants for the extra advances above what *Streather* was entitled to, and directed the jury to find for the plaintiffs with nominal damages, giving liberty to the plaintiffs to move to increase the damages, and that it should come on as a special case. A statement of the case was accordingly drawn up by consent to lay before the Court, and the decision of the Court of Exchequer in *Crowfoot v. The London Dock Company (b)* was referred to. On this day the case was argued by

First point:  
 The defence  
 should have  
 been pleaded.

Sir *F. Pollock* for the plaintiffs. The defence set up to the present action is, that the Company, according to the terms of the agreement, were bound to reserve a fourth of the value of the work done by *Streather* in their hands till the whole was completed; and that as the work done by *Streather* amounted to 36,000*l.* at the time of his bankruptcy, the Company ought to have had 9000*l.* in hand; whereas they have advanced the sum of 49,000*l.* Now in the first place, this defence should have been pleaded. [Lord *Denman* C. J. It is admitted the plaintiffs must have a verdict; it is not put forward as a defence.] In mitigation of damages, it amounts to no more than an equitable claim, and if set up as a legal defence it should have been pleaded.

Second point.  
 The condition  
 of the bond  
 broken.

Secondly, the injury complained of by the Company comes

(a) 4 Ves. jun. 824.

(b) 2 C. & M. 637.

within the very words of the condition of the bond. The works are not completed by the day, in consequence of which the Company are obliged to call in another builder, and they are entitled to recover from the sureties all the loss they have sustained through *Streather*, to the extent of the penalty of the bonds. It will be contended that the Company might have protected themselves by retaining one-fourth in hand; but the answer is, they were not bound to do so; they took sureties instead. If they had retained one-fourth of the payments to be made, in order to secure themselves, there would have been no occasion to take security at all; but it was expressly to cover advances that they obtained the security. It is frequently objected to bankers who take security for a customer, that they might have prevented loss, by careful investigation of the state of the account. But they reply that they take security in order to obviate the necessity of exercising that vigilance. Suppose *Streather* had not been a bankrupt and had thrown up the contract, and that an action had been brought against him for the loss occasioned by his non-performance, how in such an action could he have given the present defence in evidence under a plea of non damnificatus? And that which may be recovered against the principal may be recovered against his surety, who has given a bond for the due performance of his contract. The case of *Law v. The East India Company* (a) was adverted to at the trial. In that case a surety to the East India Company for the due accounting of one of their officers, was held to be discharged by the payment of a balance to the principal, under an erroneous settlement of accounts by the officers of the Company without their authority or knowledge. There were some disputes as to the balance of an account between the administrator of a deceased officer and the Company, and it appeared that the officers of the Company, against the Company's consent, had ultimately allowed the balance stated by the administrator, and paid it to him. On the Company after-

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wards seeking to recover the penalty of the bond from the surety, the Master of the Rolls said, " Nothing is more clear than whether that (the payment) was done with the consent and by the order of the Company, or not, but ignorantly by their order, it was as to the two sureties a complete discharge." Now, first of all it is to be observed that that was a case in equity, where the construction of rights between principal and surety is very different from that in Courts of Law. In equity, a surety is often entitled to relief when he would obtain none here. But, secondly, the condition of the bond in that case was, that the principal should account for all money expended by him on behalf of the Company; and there could not be better evidence of a proper accounting than the fact of the Company having paid over a balance to the principal.

First point.

Sir *J. Campbell* A. G. contrà. The point has now been made for the first time, that the defence set up by the plaintiffs should have been pleaded, and as the objection was not taken at *Nisi Prius*, it cannot be made now. The original motion was only to increase the damages. It need not however, and could not, have been pleaded. The condition of the bond is broken, and the defendants are liable in damages. The only question is, to what amount.

Second point.

The Company in this case paid over to *Streather* the whole value of the work done by him, without retaining one-fourth, as they should have done, for the indemnity of themselves and the trustees; and besides that, they made him further advances of 13,000*l.* odd. No doubt in so doing they have sustained a loss, and for this they would now make the sureties guarantees. But the loss has accrued, not in consequence of the non-performance of the contract, but from their having advanced money to *Streather* without security; this clearly appears from the award made by Mr. *Cresswell*, which is set out in *Crowfoot v. The London Dock Company* (a). If the Company had retained the fourth part of the value of the work done by

(a) 2 C. & M. 637.

*Streather* in their hands, viz. 9,000*l.*, they would have had upwards of 20,000*l.* wherewith to complete the contract, which only cost 18,700*l.* odd in completion. In fact the contract was completed within the amount, to which *Streather* would have been entitled. Suppose, in the case put on the other side, *Streather* had not been a bankrupt, and an action had been brought against him for non-performance. The declaration would have set out the contract, and the breach; whereby the Company were obliged to employ *A. B.* to complete the works. But if it turned out that the works were completed within the original contract price, the Company could only have recovered nominal damages from *Streather* himself,—how then can they recover more from the sureties? Of course *Streather* would have been liable to them for the total amount for money lent, but that has nothing to do with the contract on the bond. *Law v. The East India Company* (a) bears directly on the present case. The ground of Lord *Alvanley's* M. R. judgment that payment by the East India Company discharged the sureties, goes to the whole of this action. Suppose that the Company had advanced to *Streather* the whole sum of 52,200*l.* without a stroke of work being done, and that he had absconded, is it pretended that they could have recovered that from the defendants? Or that *Streather* had done work to the amount of 50*l.*, and had asked for an advance of money, and the Company had advanced the whole; could the Company have recovered, even if there had been no special contract as to the mode of the payment? But here the money was advanced to *S.* as a regular loan.

Sir *F. Pollock*, in reply. If the sureties had entered into a bond for 52,000*l.* and there had been no stipulation as to the mode of payment, no doubt they would have been liable to the whole amount. For what other purpose could they have been made sureties except for the purpose of securing advances? So in the case of no work having been done, the defendants would be liable to the amount of their

(a) 4 Ves. jun. 824.


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obligation ; for the object in taking them was for additional security. It has been said that the amount sought to be recovered, could not have been recovered from *Streather*, in an action on the contract, but only on the money counts. That, however, is not so, for all the sums advanced were on account of the contract. If the action had been brought for money lent, there would have been a nonsuit, directly it appeared that there was a special agreement on the subject. This balance therefore could have been recovered against the principal in such an action, as it may be also against the sureties.

Second point. Lord DENMAN C. J.—I do not at all wish to be considered as bound by the opinion I gave at *Nisi Prius*, but I must own, after the discussion the case has undergone, that I see no reason to change it. It is clear that the losses in this case have not fallen on the Company by reason of the breach of the bond, but through the advances made by the Company to *Streather*, and therefore I think they are not entitled to call on the sureties to make those losses good. This appears to me to have been brought to light so fully, that it would be waste of time to say more.

Second point. LITLEDALE J.—It appears to me that the advances made by the Company, over and above the value of the work done, cannot be considered as advances made on the contract. It is true that the bankrupt made application to the Company for advances to carry on the contract, and it might have been prudent to make such advances, but still they were not within the terms of the contract. When a contract like this has been entered into by a surety, he is entitled to see that it is duly executed on both sides, as well by the Company as by the principal, and if they choose to make advances not authorized by the terms of the contract, it must be at their own risk. How is the surety to know what is going on with regard to the advances ? and if in this case the sureties did know, that can make no difference in the principle of law. The equity of the case is

this, the contract has been completed for less money than *Streather* would have been entitled to; and although it is true that the contract was not completed at the time specified in the bond, and therefore, according to *Littler v. Holland* (a), the completion of the contract at a further time, by agreement, would not amount to a performance of the condition, it is unnecessary to say what would have been the effect of such a breach assigned, for the breach does not go for damages in consequence of non-performance within the stipulated time. It has been said that this defence should have been pleaded, but I think it could not. Suppose the plea had been, that the plaintiffs were damaged in their own wrong, I do not think that could have been supported, for they were not damaged at all if the sums were voluntary advances made by the Company.

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First point.

PATTESON J.—The question is, whether on the breach alleged any damage has been sustained by the Company, and it appears to me there has not. Whether any action at all could be maintained on the bond when the time specified in it has been altered by agreement (b), is not material to be considered, because the point cannot be raised on these pleadings, where the defendant has only pleaded non est factum; and it is quite clear that there has been a breach of the condition. The plaintiffs, therefore, are entitled to recover, and the only question is, whether they have sustained any damage. It has been said, that if they had secured themselves by retaining one-fourth of the amount due to *Streather*, where would have been the use of taking security, and therefore that it cannot be the true construction of the bond, that they were bound to retain one-fourth, and to make no advances. I think I can see the use of their demanding security; *Streather* might have been unable to complete the contract, and the builder resorted to by the Company to finish the works might not have done

Second point.

(a) 3 T. R. 590.

East, 619; *Evans v. Thomson*, 5

(b) See *Brown v. Goodman*, 3 T.

East, 189; *Terry v. Duntze*, 2 H.

R. 592, n.; *Heard v. Wadham*, 1

Bl. 389.

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so for the sum contracted for by *Streather*, in which case they would have fallen back upon the sureties, and that might be the reason why the sureties only consented to bind themselves for 5000*l*. The terms of the agreement are, that the work shall be performed by a certain time, and that *Streather* should not be entitled to any payment till it was certified that one-eighth of the work was completed, and then to only three-fourths of the work done. Any payment made at such time, I agree, would be a payment on the contract, but not according to the contract. I should say, therefore, that even if no advances had been made on the securities given by *Streather*, still the defendants would not be liable, because the whole works have been performed for the prices stipulated by the contract; much less, therefore, when the Company made the advances on security given by the bankrupt.

Second point. WILLIAMS J.—The facts of this case make it very clear. According to the particulars delivered, it appears that the Company have had their works finished for 600*l*. less than *Streather* would have been entitled to. The advances that were made to the bankrupt, were certainly not made according to the contract, but before any money was payable to him under that contract, and were made on securities given by him.

Judgment for the defendant.

Tuesday,  
 June 6th.

REYNOLDS v. BLACKBURN and others.

Assumpsit by  
 indorsee  
 against accep-  
 tor of two bills  
 of exchange.  
 Plea, that the  
 defendant ac-

ASSUMPSIT, by indorsee, against the acceptors of two bills of exchange. The defendants pleaded, 1. Non acceptance; 2. That they accepted the bills for the accommodation of *Thomas Tempest*, the drawer, without receiving the bills for the accommodation of the drawer, and that the drawer gave the plaintiff divers other bills of exchange, and that it was agreed between the drawer and the plaintiff, that in consideration of the premises, the plaintiff should forbear to sue the drawer on the first-mentioned bills of exchange, until default in payment of the latter: that the said bills were delivered and accepted by the plaintiff in payment of the first-mentioned bills, and that the agreement was made without the privity of the defendant. Replication, de injuriâ. Held good, on demurrer.

any value or consideration for the said acceptances, or either of them, of which the plaintiff then had notice: and the said defendants further say, that after the bills were indorsed, and before they became due and payable, and before the commencement of this suit, the said *T. T.*, the drawer, gave and delivered to the plaintiff, who then accepted from the said drawer divers other bills of exchange, for divers large sums of money, in the whole exceeding the amount of the said sums mentioned in the said bills in the said declaration mentioned, to wit &c. ; and it was on that occasion agreed by and between the said drawer, *T. T.*, and the plaintiff, that the said plaintiff, in consideration of the premises, should forbear to sue him the said drawer, upon the said bills in the said declaration mentioned, or either of them, for a long time, to wit, for three months, and until default should be made in the payment of the said bills so delivered by the said *T. T.*, the drawer, to the said plaintiff, in payment of the said bills in the said declaration mentioned. And the defendants further say, that the said bills were so delivered and accepted in payment of the said bills in the said declaration mentioned; and the said agreement was so made by and between the plaintiff and the said *T. T.* as aforesaid, without the knowledge, privity, or consent of the said defendants, or any of them. Replication to the second plea, *de injuriâ*. Demurrer to the replication, for the following causes: That the replication is double, and puts too many facts in issue; that it does not sufficiently confess and avoid the facts alleged in the plea; that it does not distinctly and formally traverse the facts alleged in the plea; that *de injuriâ* is not the proper form of a replication to a plea in an action of *assumpsit*. Joinder in demurrer.

*Addison*, for the defendants. The last cause of demurrer must of course be abandoned, since the recent decisions of the Courts of Common Pleas and Exchequer (*a*).

(a) See *Griffin v. Yates*, 2 Bingham N. C. 579; *Isaac v. Farrar*, 1 M. & W. 65.



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With respect to the first cause : where the plea contains a single defence by way of excuse, the replication *de injuriâ* is proper ; where the plea goes wholly or partially in denial of the contract, or shews payment and satisfaction, the replication is improper. Here the plea partially denies the contract, and states a different one. The acceptance of a bill of exchange *primâ facie* denotes a consideration. It imports, as a part of the contract between the parties, that the bill was accepted for a consideration. Therefore, a plea denying the consideration does not merely allege matter in excuse, but qualifies or alters the contract in the declaration ; and cannot be replied to by the mere averment, *de injuriâ* ; *Crisp v. Griffiths* (a) and *Whittaker v. Mason* (b). Then as to the duplicity of the replication. The plea itself is double ; it contains two defences : first, that time was given, and the acceptors thereby discharged : secondly, that there was payment, by bills given by the drawer to the plaintiff. The plea might, therefore, have been demurred to ; but the plaintiff has chosen to reply in a mode which puts both these defences in issue ; the replication is therefore double. [*Patteson* J. You plead a faulty plea, which induces him to plead a bad replication.] That may be. That does not preclude the defendant from objecting to the replication. Suppose an immaterial issue taken by reason of an unnecessary allegation in the plea.

LORD DENMAN C. J.—If the replication is bad for duplicity, that is occasioned by the necessity of replying to the defendant's bad plea, and cannot be taken advantage of on demurrer.

PATTESON J.—Neither of the causes of demurrer is sufficient. This plea does not deny the contract, it merely alleges matter in excuse : *de injuriâ* is therefore a proper replication.

Judgment for the plaintiff.

(a) 2 C., M. & R. 159.

(b) 2 Bing. N. C. 359.

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## WILLIAMS v. BYRNE.

**ASSUMPSIT.** The declaration stated, whereas heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, would enter into the employ of the defendant, in the capacity of a reporter of the proceedings in the House of Commons and House of Lords, and would furnish reports of such proceedings and other articles to the defendant, for the purpose of publication in a public newspaper of the defendant called "The Morning Post," for one whole year from a certain day, to wit, from the day and year aforesaid, and so from year to year to the end of each year commenced, whilst the plaintiff should be so employed by the defendant as aforesaid, and reckoning each year to commence from a certain day, to wit, the 20th day of May, therein for so long as the plaintiff and defendant should respectively please, and for a certain salary or wages, to wit, a salary or wages at the rate of five guineas per week, for and during each session of parliament, and at the rate, to wit, of 2*l.* 12*s.* 6*d.* per week for and during the remainder of the year; the defendant undertook and then promised the plaintiff (in the words of the contract); averment, that plaintiff entered into the employ of the defendant in the capacity and on the terms aforesaid, and furnished reports for two years then next following, and also for part of another year after that time, to wit, until the 24th October, 1835; and that plaintiff was willing and offered to continue in the employ of defendant for the remainder of the said last-mentioned year: Yet the defendant did not nor would continue the plaintiff in his, the defendant's said employ, until the expiration of the said last-mentioned year, but, on the contrary thereof, to wit, on the day and year last aforesaid, refused to suffer the plaintiff to continue in his, the defendant's, said employ, and wrongfully discharged the plaintiff therefrom without any reasonable or probable cause whatsoever; and had hence hitherto

A contract to serve, as reporter to a newspaper, one whole year from a certain day, and so from year to year to the end of each year commenced, so long as the parties shall respectively please, is a yearly service so long as it lasts, and cannot be terminated except at the end of any current year.

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wholly neglected and refused to retain or continue the plaintiff in his, the defendant's employ, for the remainder of the last-mentioned year so commenced as aforesaid, *per quod*, &c.

The fourth plea to the declaration stated, that after the making of the said promise of the defendant, and before the said discharge of the plaintiff respectively therein mentioned, to wit, on the 5th of October, 1835, the defendant, being desirous to determine and put an end to the said agreement, and of his, the defendant's, said employ of the plaintiff in the said capacity, tendered and offered to pay to the plaintiff a large sum of money, to wit, 18*l.* 10*s.*, as and for and in the names of salary and wages, the same being more than the amount of salary or wages to which the plaintiff would be and have been entitled to if a reasonable and usual notice of determining the said agreement and employ of the plaintiff had been given to him by the defendant, and required the plaintiff to immediately quit his, the defendant's, said employ : And the defendant says, that he did at the same time give to the plaintiff a reasonable and usual notice of his, the defendant's, intention, in case of the said tender and requisition so made by the defendant being refused by the plaintiff, to put an end to the said agreement and the said employ of the plaintiff in the said capacity, to wit, at the end of three weeks from the 3rd day of October then instant : And the defendant says, that the plaintiff wholly refused to accept the said sum of 18*l.* 10*s.*, or any part thereof, or to quit the said employ : Wherefore, at the expiration and end of the said notice, being the said time when &c., he the defendant discharged the plaintiff from his, the defendant's, said employ in the said capacity, and hath from thence hitherto refused and still doth refuse to employ the plaintiff in his said capacity, or in his, the defendant's service, as he lawfully might, for the cause aforesaid ; concluding with a tender of 18*l.* 10*s.*

Special demurrer and joinder. The marginal note to the demurrer was as follows :—One of the causes of de-

murrer to the fourth plea is, that the matters alleged in that plea constitute no defence to the first count, for by the terms of the contract, as therein stated, defendant was to keep plaintiff in his service a year, and there is no stipulation enabling defendant to dismiss plaintiff at the time, or on the terms mentioned in the plea.


*W. H. Watson* in support of the demurrer. The contract stated in the declaration is express, to serve "for one whole year, and so from year to year to the end of each year." It is clear, therefore, that a three weeks' notice to quit at any time during the year, cannot be good. In *Beeston v. Collyer* (a) it was attempted to assimilate a clerk to a menial servant, as to being discharged at a month's notice; but it was held, that a yearly engagement could only be terminated at the end of the year, and the analogy was pointed out between a yearly service and the hiring a tenement. So also a composition for tithes, though not exactly a yearly tenancy, can only be put an end to at the end of the current year (b). So, in *Fawcett v. Cash* (c), where there was evidence of a yearly hiring, the Court held, that the master could not terminate it in the middle of the year. (He was stopped by the Court.)

*Mansell* contra. The question in these cases always is, what is reasonable notice? *Beeston v. Collyer* (a) tends to shew that reasonable notice may put an end to contracts of this kind. *Burrough* J. said, "Unless reasonable notice was given, or ground for dismissal assigned, the defendant was bound to go on to the end of the year." Reasonable notice has been alleged in this plea, and it is admitted by the demurrer, otherwise it would have been a question for the jury. The hiring was for one year, and then from year to year, it is not therefore like a dismissal in the first year, as in *Fawcett v. Cash* (c). In that case *Taunton* J. said, "It is unnecessary to consider what the effect would have

(a) 4 Bingh. 309.

(c) 3 N. & M. 177; S. C. 5

(b) See *Hulme v. Pardoe*, B. & Ad. 904.  
M'Clel. 393; S. C. 13 Price, 684.

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been if the dismissal had taken place after the first year." That case, therefore, does not apply, and it stands admitted that the contract was terminated after the first year, namely, in the third year, by reasonable notice. [*Littledale J.* The contract in the declaration is, to serve for a whole year, and so on from year to year to the end of each year. You set up an inconsistent plea, shewing a different contract.] Where there is a contract between master and menial servant, the law imports that there is a power to terminate it, by a month's notice; the same thing may be inferred here on this record.

**LORD DENMAN C. J.**—There is no doubt in this case. The declaration states a contract to serve for a whole year, and so from year to year to the end of each year commenced. This contract the defendant does not deny, but says that he offered him more wages than he was entitled to if he stopped during the three weeks in which he had notice to quit. What is there to shew that such a mode of terminating the service was any part of the contract? The defendant should have made it appear that it was a term in that contract that he was entitled to put an end to it in such a mode, and then he might have taken the opinion of the jury, whether that was the contract or not. For in these cases the question always is, what was the contract made between the parties.

**LITTLEDAL J.**—On this contract it appears to me, that at the end of each year a new contract arose to serve for the year commenced, and so to continue for as long as the parties should please, but which could only be terminated at the end of the current year. The case of a menial servant has been put, who may be discharged at a month's notice, but that is not a matter of law; it is a custom that might be put on the record as a fact, and the jury would find that it existed; but if it were put on the record as a matter of law, the Court could not distinguish between the hiring of a menial servant from any other yearly service.

PATTESON J.—The only question here is, what is the meaning of this contract, as put upon the contract and not denied? It is said that reasonable notice is a question for the jury; to which I agree, if the point arose. But here a yearly hiring is stated, and that in law can only be put an end to at the end of a current year. How many months' notice may be necessary to put an end to such a service, it is not necessary to say, for the plea shews that it was not put an end to at the termination of the current year.

WILLIAMS J.—This case stands exactly as if the defendant had terminated the service in the middle of the first year, for the service in the second or third year is expressly contracted to be till the end of such year so commenced. It therefore should have terminated at the end of the year. No delinquency of any kind is suggested to authorize any other termination, and the notice relied on is clearly insufficient.

Judgment for the plaintiff.

SMITH v. EGGINGTON.

Tuesday,  
June 6th.

TRESPASS and false imprisonment in the gaol of Kingston-upon-Hull, for the space of two months. Pleas, 1st. Not guilty; 2d. As to the assault and imprisonment, and detaining the defendant in prison for the period in this plea mentioned, part of the time in the declaration mentioned, the defendant says &c., that on &c., there issued

In an action of trespass and false imprisonment against the sheriff, the plea justified under an attachment out of the Court of Chancery

for a contempt, and that no order was made by the Court to discharge the plaintiff, and no habeas corpus sued out. The replication averred, that the plaintiff was kept in custody more than thirty days, without being brought up to the Court, or without being cleared for the contempt; and that it therefore became the duty of the defendant to discharge the plaintiff according to the statute, (11 Geo. 4 and 1 W. 4, c. 35, s. 15, rule 5,) but that the defendant (though requested) would not. Held, that in these pleadings there was nothing to shew that the defendant was a trespasser *ab initio*.

And *semble*, that trespass was not maintainable against the sheriff in such a case.

*Semble* also, that if an action on the case had been brought against the sheriff it would not have been maintainable without notice to him for what contempt the prisoner was in custody, as a prisoner is not entitled to his discharge at the end of thirty days for all contempts.

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out of the Court of our lord the king of his Chancery, the said Court then being held at Westminster in the county of Middlesex, a certain writ of our said lord the king of attachment, directed to the sheriff of the town and county of Kingston-upon-Hull, by which said writ our said lord the king commanded the said sheriff to attach the said *Elizabeth Smith*, the plaintiff in this suit, and one *Joseph Dudding*, so as to have them before our said lord the king in his said Court of Chancery on the 8th day of January then next, wheresoever the said Court should then be, there to answer to our said lord the king, as well touching a contempt which they the said *Elizabeth Smith*, the plaintiff in this suit, and the said *Joseph Dudding*, as it was alleged had committed against our said lord the king, as also such other matters as should be there and then laid to their charge, and further to perform and abide such order as the said Court of our said lord the king should make in that behalf, and that the said sheriff should thereof fail not, and that he should bring that writ with him ; which said writ afterwards &c. was delivered to defendant in this suit, who then and from thence &c. was sheriff of the said town &c. to be executed in due form of law, by virtue of which said writ (averment of arrest of plaintiff on the 18th December, 1834, by defendant). And the said defendant says, that he not having received any writ of *habeas corpus*, or other writ, order or direction, to bring the said *Elizabeth Smith*, the plaintiff in this suit, from the said prison to the bar of or into the said High Court of Chancery, or other competent authority to discharge the said plaintiff from his custody under the said writ of attachment, until the receipt of the order hereinafter mentioned &c., kept and detained her in prison in the said gaol or prison, under and by virtue of the said writ of attachment, from the time of his so carrying and conveying her to prison as aforesaid, until the 31st day of March, 1835, when a certain order made upon the 30th day of March, in the fifth year aforesaid, in a certain cause then depending in the said High Court of Chancery, wherein

*Richard Dudding* and *John Dudding* were plaintiffs, and *George Smith* (then deceased), the said *Elizabeth Smith* (the plaintiff in this suit), and *Joseph Dudding*, were defendants; being the cause or suit in which the said writ of attachment was issued as aforesaid, but in the said order described as being a cause in which the said *John Dudding* and *Richard Dudding* were plaintiffs, and the said *Elizabeth Smith*, the plaintiff in this suit, alone was defendant, by Sir *Launcelot Shadwell*, Knight, then being Vice Chancellor of Great Britain, whereby it was ordered that the said *Elizabeth Smith*, the plaintiff in this suit, should be discharged out of the custody of the defendant in this suit, as to the contempt for which the said writ of attachment was so issued as aforesaid, was duly presented and shewn to him the defendant in this suit, and thereupon the defendant forthwith discharged the plaintiff from and out of his custody, and permitted and suffered her to go at large from and out of his custody wheresoever she would. Averment of *quæ sunt eadem*. Replication to the second plea: That true it is the said writ in the second plea mentioned issued out of the Court of our said lord the king of his Chancery, and that the defendant by virtue of the said writ afterwards, to wit, on the said 18th of December, took and arrested the plaintiff, and imprisoned her &c., nevertheless saith that the said writ issued against the plaintiff for a contempt in not answering a certain bill before then filed in the said High Court of Chancery, against the said plaintiff and one *George Smith*, and one *Joseph Dudding*, at the suit of the said *John Dudding* and *Richard Dudding*, in the second plea mentioned, and that the plaintiff, being under such process of contempt for not answering, was in actual custody of the defendant in the said gaol for the space of thirty days, under the said writ, to wit, from the said 18th day of December in the year 1835, and she the plaintiff was not, during all that time, brought to the bar of the said High Court of Chancery under process, to answer her contempt, nor was her contempt, during or at the expiration of that

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time, or at any other time, cleared. And the plaintiff further saith, that the last of the thirty days during which the plaintiff was in actual custody under the said process of contempt as aforesaid, to wit, the said 17th day of January, in the year of our Lord 1835, aforesaid, happened in term, to wit, in Hilary term in the year last aforesaid, and that the said *John Dudding* and *Richard Dudding*, the plaintiffs in the said suit, did not, nor did either of them, nor did any other person, although the contempt of the plaintiff was not sooner cleared, bring the plaintiff by a habeas corpus to the bar of the said Court of Chancery, within thirty days from the time of her being actually in custody in the said gaol upon the said process of contempt, but on the contrary thereof wholly omitted and neglected so to do. By reason whereof it became and then was the duty of the defendant, so being sheriff and having the plaintiff in his custody as aforesaid, to have thereupon discharged the plaintiff out of custody under the said process of contempt; and although the plaintiff afterwards and after the expiration of thirty days, to wit, on the 18th day of January, 1835, aforesaid, and often afterwards, requested the defendant to discharge the plaintiff out of his custody under the said process of contempt, yet the defendant, not regarding the statute in such case made and provided, did not nor would, at the expiration of the said thirty days, and when he was requested as aforesaid, discharge the plaintiff out of his custody under the said process of contempt, but wholly refused and omitted so to do; and on the contrary thereof, wrongfully and against the will of the plaintiff, and contrary to the form of the statute in such case made and provided, imprisoned the plaintiff in the said gaol, and kept and detained her in prison there, in manner and form as the plaintiff hath above in her said declaration complained against the defendant. Special demurrer, and joinder. The marginal note to the demurrer stated, that "the defendant will contend that he is not liable to be sued in this action under 11 Geo. 4 & 1 Will. 4, c. 36, s. 15, rule 5, for detaining the plaintiff in

custody under the attachment ;" and he will also insist that the replication is bad, for the causes assigned as the grounds of special demurrer.

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*R. V. Richards*, in support of the demurrer. In any view that may be taken of this case, it is clear the sheriff cannot be proceeded against as a trespasser. The first arrest on an attachment out of the Court of Chancery, is admitted to be lawful ; the question is, what the sheriff's duty, in such a case, is, as rule 5 of 11 *Geo. 4* & 1 *Will. 4*, c. 36, s. 5, enacts, "that if the defendant, under process of contempt for not appearing or not answering, be in actual custody, and shall not have been sooner brought to the bar under process to answer his contempt, the plaintiff, if the contempt be not sooner cleared, shall bring the defendant by a habeas corpus to the bar of the Court within thirty days from the time of his being actually in custody or detained (being already in custody) upon process of contempt, and if the last day of such thirty days shall happen out of term, then within the four first days of the ensuing term, &c., and in case any such defendant shall not be brought to the bar of the Court within the respective times aforesaid, the sheriff &c. in whose custody he shall be, shall thereupon discharge him out of custody, without payment by him of the costs of contempt, which shall be payable by the party on whose behalf the process issued." Two questions arise upon this rule ; 1st. Whether the sheriff is bound to discharge a prisoner at the end of thirty days without any order from the Court, or any notification of the circumstances under which he is in custody ? 2nd. If under some circumstances he is bound to discharge, whether the other party is not bound to give him notice of the circumstances ? The words of the rule, taken most strongly against the defendant, shew only a non-feasance and not a trespass ; for it is clear that arrest by process until set aside, forms a perfectly good justification in trespass. But it does not appear in the declaration that the plaintiff had notice of the cause of the attachment, and

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therefore the sheriff's duty did not arise, as the attachment might have been for other causes than contempt in not answering. If the Court should hold that the sheriff is bound to inform himself of the cause of the attachment, it would throw great difficulties upon him to ascertain the cause, as it does not appear on the face of the attachment; whereas there is no hardship in requiring the prisoner to give notice to the sheriff, or to get an order of discharge from the Court. The attachment being originally good, the imprisonment is justified by the plea, for the replication is not by way of new assignment. According to the *Six Carpenters' case* (a), if it should be now held that the attachment was a licence to take the plaintiff for thirty days, the defendant would not be a trespasser.

Lastly, to make the sheriff a trespasser, it should have been averred in the record that the sheriff had notice. Actions against the sheriff on the 23 *Hen. 6*, c. 9, for not taking a bail-bond, are never brought in trespass. The words in that statute are, "that the sheriff shall let out of custody;" in this statute they are "that the sheriff shall discharge," which are quite analogous. The 8 *Ann. c. 14*, s. 1, enacts, "that no goods or chattels shall be taken in execution without leaving a year's rent for the landlord;" but trespass has never been brought against a sheriff for omitting to do this. This is like the case of *Crozer v. Pilling* (b), where the plaintiff brought an action on the case against the defendant for not directing the sheriff (in whose custody the plaintiff was on a *ca. sa.* at the suit of defendant), to discharge the plaintiff out of custody after having had the debt and costs tendered to him, and it was held that the action lay; but it was never imagined that trespass could have been brought. Trespass never lies for a nonfeasance; *Eccles v. —* (c). And in this case there is no act done by the sheriff, it therefore does not fall within the principle of *Winterbourne v. Morgan* (d). An analogous case to the present often occurs in practice, where

(a) 3 Rep. 14 b.

(c) 2 Wils. 313.

(b) 6 D. & R. 129; S. C. 4 B. & C. 36.

(d) 11 East, 395.

a prisoner is detained in custody for want of a declaration ; there, though the sheriff has direct notice that no declaration has been served, he is never proceeded against as a trespasser, and he is not bound to discharge the prisoner till he obtains a supersedeas.

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*Hurlstone*, in support of the replication. The sheriff is bound, under the 11 *Geo.* 4 & 1 *Will.* 4, c. 36, to discharge a prisoner in custody on process of contempt at the end of thirty days, and therefore he may be liable in this form of action. The pleadings shew that the plaintiff was in custody for contempt, that thirty days had elapsed, that the plaintiff applied to be discharged, and that the defendant refused. This refusal is a misfeasance, which will support the action. The fifth rule, which directs the sheriff to discharge, makes no mention of the necessity for an order of Court, and the clear intention of the statute was, that a prisoner should be discharged without any order being necessary. When the statute requires an order of the Court to be made, it provides for it in express terms, as in s. 13, and s. 15, rule 2, and rule 18. The intention of the statute was to bring all prisoners for contempt of the Court of Chancery into the Fleet prison (which is the prison of the Court) as soon as possible, in order to compel answers, and make the process effectual. In the Courts of Equity it is clearly understood that no order is requisite for the discharge of a prisoner; for *In Re Dunn*, Easter term, 1836, MS., where a prisoner was brought up to the bar of the Court after the thirty days had expired, by the sheriff, and an order for his discharge was applied for, the Vice Chancellor held that it was not necessary, and that he was entitled to his discharge forthwith. Assuming then that no order was necessary, there was no attachment to warrant the sheriff in detaining the plaintiff. In 2 *Inst.* 53, it is said, "if the king's writ come to the sheriff, to deliver the prisoner, if he detain him, this detaining is an imprisonment against the law of the land." Now the words of this act are equally compulsory with the

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king's writ. Suppose a defendant in custody on a *ca. sa.* paid the debt and costs, and the jailor refused to discharge him, he clearly would be liable in trespass. [*Patteson J.* Is there any authority to that effect? (a)] In *Bland v. Hutton*, tried at Lincoln, where the sheriff arrested the plaintiff under a *fi. fa.*, he was held liable in trespass. [*Patteson J.* That is no authority at all.] As to the new assignment, the plea justifies the whole time of the imprisonment laid in the declaration, the plaintiff therefore could not new assign, as he could not shew any distinct act of trespass. The replication here, though of the nature of a new assignment, in fact replies the abuse of the defendant's authority, which is the proper form (b.) [Lord *Denman C. J.* In *Salmon v. Percivall* (c), where the plaintiff brought trespass against a serjeant-at-mace for not discharging him out of custody after tender of sufficient bail, it was held, that even if it were the serjeant's duty to take bail, that would not make him a trespasser *ab initio*. That is very similar to this case.] That probably was considered a mere breach of duty in the serjeant, there was no statute directing him to discharge prisoners on bail.

*R. V. Richards* in reply. It is important to determine the first point, whether the sheriff is bound to ascertain the nature of the process lodged with him, and to discover for what contempt the attachment is for. The Court must, of necessity, impose some limitation upon the terms of the fifth rule, for it says, that at the end of thirty days the sheriff shall discharge out of custody; but it is clear he cannot do that in all cases; for instance, if any detainers are lodged. The sheriff in fact is called upon for the misfeasance of the plaintiff in not giving notice of the cause of attachment.

(a) In *Slackford v. Austen*, 14 East, 468, it was held, that payment of the debt and costs by the defendant in custody on a *ca. sa.* to the sheriff, did not entitle him to his discharge, and the law was re-

cognized in *Crozer v. Pilling*, 6 D. & R. 149; S. C. 4 B. & C. 26.

(b) 1 Chitt. Pl. 639, 6th edit.; 1 Wms. Saund. 299.

(c) Cro. Car. 196.

LORD DENMAN C. J.—I think it is quite clear that trespass is not maintainable against the sheriff in this case, and that if he is liable at all, he should be sued in case. The case of *Salmon v. Percivall* (a), is quite in point. Where the law consigns a party to the custody of another, he certainly should have notice when the term of the imprisonment has expired.

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LITLEDALE J.—I am of opinion this action cannot be maintained, and that, even if it could, the replication is ill drawn, for the trespass should have been newly assigned. I do not see how, in a case like this, the sheriff could be treated as a trespasser *ab initio*; for it cannot be made out that he had no authority to arrest and imprison in the first instance. The action therefore should have been on the case. But it does not appear that the sheriff had any notice of what the attachment was for; the replication indeed avers that it was for a contempt in not answering, but the defendant, by demurring to the replication, does not admit that he had any notice; and it is not for every contempt that a prisoner in custody is entitled to be discharged. Without distinct notice to the sheriff of the cause of the attachment, I do not think that any action whatever could be maintained against him.

PATTESON J.—The declaration is general for trespass and false imprisonment, and is silent as to the special facts of the case. The plea justifies under an attachment out of the Court of Chancery. Then what does the replication say? It does not abandon the imprisonment justified under the plea, and go upon a different imprisonment, but states an abuse of it. How then does that make the defendant a trespasser *ab initio*? I think, however, trespass would not lie at all in this case, though it is not necessary to decide that expressly in this case. I would also say, that no action at all would lie, for how is the sheriff

(a) Cro. Car. 196.

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to know for what contempt the prisoner is in custody. It ought to appear on the record that the party had informed the sheriff for what he was in custody; it is not however necessary to go into that, but only to say, there is nothing in this record to shew that the defendant was a trespasser *ab initio*.

WILLIAMS J. concurred.

Judgment for the defendant.

Thursday,  
June 8th.

REX v. BYRNE.

1. *Semble*, an affidavit to found a criminal information can be read, where the county in which it is sworn does not appear in the jurat, but does in the affidavit itself.

Per *Patteson J.*  
2. The effect of slanderous words on a defendant in an affidavit, to procure a criminal information against him.

A Rule nisi had been obtained for a criminal information against the defendant, on an affidavit made by — Esq. for slanderous words spoken to him in the exercise of his office as a magistrate.

*Bliss* now shewed cause, and contended that the rule must be discharged, as the jurat to the affidavit on which the information had been obtained, did not shew the county where the deponent was sworn; *Rex v. Justices of West Riding(a)*, and *Rex v. Cockshaw(b)*. [*Patteson J.* In those cases there may have been a total omission of the place, but here it appears from the affidavit.] That is not sufficient, for the affidavit cannot be read unless the jurat is regular.

But there is another objection on the face of the affidavit, as it is filled with slanderous matter of the defendant. In *Saunderson's bail(c)* it was held, that affidavits containing general slanderous matter on the character of the bail, could not be received. [*Patteson J.* In *Thompson v. Dicus(d)*, where slanderous matter was introduced into an affidavit in support of a rule, the Court deprived the party of the costs of a rule, to which he would otherwise have been entitled.] *Bliss* then read the affidavit of the pro-

(a) 3 M. &amp; S. 493.

(c) 1 Chit. 676.

(b) 2 N. &amp; M. 378.

(d) 2 Dowl. P. C. 93.

secutor, which reflected in very intemperate language on the defendant.

*Alexander*, *contra*. The rule ought to be made absolute, for the words used to the magistrate were clearly actionable. The style of the affidavit is to be regretted.

LORD DENMAN C. J.—The prosecutor here has introduced terms and expressions in his affidavit impertinent to the case. It ought clearly to be understood, that parties applying for a criminal information ought to confine themselves to the simplest statement of facts, and never to introduce the slightest intemperance of language. That which is used by the prosecutor, in this case, makes us hesitate to decide that he has entitled himself to that protection which the Court is ever ready to throw around a magistrate.

With regard to the other point, on which *Rex v. Cockshaw* (a) has been cited, I think it appears to have been given up, and I should not wish to express any opinion, so as to say that the affidavit is wrong, in a case of such general practice as this.

LITTTLEDALE, PATTESON, and WILLIAMS Js. concurred.

Rule discharged, without costs.

(a) 2 N. & M. 378.

The KING v. The Justices of WARWICKSHIRE.

Thursday,  
June 8th.

AT the Michaelmas quarter sessions, 1836, for the county of Warwick, the parish of Solihull appealed against an order of removal, from the parish of Norton Lindsey, and upon the appeal being called on, it appeared that the statement of the grounds of appeal, required by sect. 81 of the Poor Law Amendment Act (b), had been served upon *Thomas Canning*, who was the churchwarden, and also one of the overseers of the parish of Norton Lindsey, but not

A statement of grounds of appeal, against an order of removal under the 5 & 6 W. 4, c. 76, s. 81, signed by the majority of parish officers, is good, and service on one of the officers only, is good if without fraud.

(b) 4 & 5 Will. 4, c. 76.

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upon the other overseer. The Court thought this was not a service according to the new act (a), and dismissed the appeal. It also appeared that the notice of appeal by the parish of Solihull, and the grounds thereof, had been signed by four churchwardens and two overseers, but it turned out that there was an assistant overseer who had not signed. A rule nisi having been obtained, for a mandamus to the justices to enter continuances and hear the appeal,

First point:  
 Whether the  
 statement of  
 grounds of ap-  
 peal should be  
 signed by *all*  
 the parish offi-  
 cers.

*Waddington* and *Miller* now shewed cause against it (b). First, it is contended, that to satisfy the words of the 81st section (a), as there was an assistant overseer, he also ought to have signed the statement of the grounds of appeal. That section enacts, that the overseers or guardians, or any three of them, shall send, under their hands, a statement in writing, of the grounds of such appeal; and the interpretation clause, sect. 104, declares that an overseer shall be construed to mean an assistant overseer.—[*Patteson J.* We held the other day, that an assistant overseer is only an overseer so far as he is authorized by his warrant, and that when the warrant is not before us, we will not infer that he had authority to sign these notices (c). That decision, it is true, was on another clause (sect. 79).] If the legislature intended that less than the whole number of overseers might sign the statement, they would have made an express provision for it, as they have in the case of guardians. By the old practice, in appeals against orders of removal, under the 9 Geo. 1, c. 7, it has been always held that a notice signed by the majority of parish officers is sufficient; but it is sin-

(a) 4 & 5 W. 4. c. 76.

(b) A similar rule had been obtained by *Waddington* in another case to the Justices of Warwickshire, where the statement of the grounds of the appeal had been served upon two of the overseers,

but not upon the majority, and it was admitted that the decision in the principal case would govern this also.

(c) *Rex v. The Justices of the North Riding of Yorkshire*, ante, 103.

gular, that in *Rex v. Beeston* (a), where *Buller J.* states this practice as an authority for his decision on another point, he cites the statute 9 *Geo.* 1, c. 7, s. 8, as if it required the notice to be given by the churchwardens *and* overseers, whereas the statute only requires the notice to be given by the churchwardens *or* overseers, on which words there never could have been a question that the signature of *all* was required. But *Nolan* (b) cites the dictum of *Buller J.* without noticing his mistake. *Right v. Cuthell* (c) is an authority respecting the parties by whom notice should be given. There, notice to quit was given by two out of three joint-tenants, who were the landlords; but as the lease required that the notice should be given by the landlords, under their respective hands, it was held that the two joint-tenants had not the power to give notice for the third, although he had subsequently ratified their act. It is true in *Doe v. Summerset* (d) it was held, that a notice to quit, signed by one on behalf of several joint-tenants, was sufficient, but that proceeded on the ground of a notice by one joint-tenant putting an end to the tenancy as to the whole, joint-tenants being seised per my et per tout, and *Right v. Cuthell* (c) was distinguished on the ground of it having been stipulated there, that all the joint-tenants should concur in the notice.

Second, sect. 81 of the Poor Law Amendment Act, requires that the officers of the parish appealing, shall *send or deliver* to the overseers of the respondent parish a statement of the grounds of appeal. Are these words satisfied by sending to one of the overseers only? By the 41 *Geo.* 3, c. 23, s. 4, it is enacted expressly, that all notices of appeal shall be delivered to the churchwardens and overseers, *or any two* of them, and the 49 *Geo.* 3, c. 68, s. 5, contains a similar provision, which shews that an enactment of the legislature is necessary to make service of notice good on

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*shire.*

Second point:  
 Whether service of the statement should be on all the parish officers.

(a) 3 T. R. 592.

(b) 2 Nol. P. L. 524.

(c) 5 East, 491.

(d) 1 B. & Ad. 135.

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less than all the parish officers. In *Rex v. The Justices of Norfolk*(a), Taunton J. pointed out that it was by the express provision of the 41 Geo. 3, c. 23, s. 4, that service of notice on two of the parish officers only was sufficient. It was contended in that case, that the parish officers formed but one person in law, but the judgments of *Bayley* and *Holroyd Js.*, in *Malkin v. Vickerstaff*(b), clearly shew that they are distinct persons.

There are cases unfavourable to the present argument, as where a notice to quit served on one of two joint-tenants, who lived on the premises, has been held to be evidence of the notice having reached the other who did not; *Doe v. Watkins*(c), *Doe v. Crick*(d); but they are perhaps distinguishable. So of a bill of exchange in the case of notice of dishonor to one of several partners, but that arises from the nature of the contract. But upon this point, the argument to be drawn from the express provision respecting service "on any three of such guardians," in the same clause, applies as well as upon the first point.

*Hayes* and *Daniel* contrà, were stopped by the Court.

LORD DENMAN C. J.—We have no hesitation in deciding that the statement of the grounds of appeal, signed by a majority of the parish officers, is good, and that service on one of them, if without fraud, is also good.

LITTLEDALE J. concurred.

PATTESON J.—This decision will get rid, for ever, of all questions that can be raised on the point.

WILLIAMS J. concurred.

Rule absolute.

(a) 2 B. & Ad. 944.

(b) 3 B. & Ald. 89.

(c) 7 East, 551.

(d) 5 Esp. 196.



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Friday,  
June 9th.


## WATTS v. FRASER and another.

**THIS** was an action for a libel by Mr. *Alaric Watts*, the proprietor and editor of *The Literary Souvenir*, against the proprietor and printer of *Fraser's Magazine*. The first count of the declaration was, for a libel on *The Literary Souvenir*, which appeared in *Fraser's Magazine* of November, 1834. The article in question contained burlesque specimens of composition, in prose and verse, which professed to be extracted from the *Souvenir*, and had the names of the contributors to that work attached to them. The second count was for a personal libel on the plaintiff, for publishing a caricature representing the plaintiff running away with pictures under his arms, which was contained in *Fraser's Magazine* of June, 1835. Plea: Not guilty.

At the trial before Lord *Denman* C. J., at the sittings after Michaelmas term in Middlesex, 1835, the plaintiff proved the publication of the libels against the defendants, upon which *Erle*, who was counsel for the defendants, proposed, in mitigation of damages, to prove that the plaintiff had given provocation for the libels, by different articles that he had from time to time published respecting *Fraser's Magazine* in *The Literary Souvenir*, and in different newspapers edited by him. This evidence was objected to by the plaintiff, and Lord *Denman* C. J. ruled, that although libels by the plaintiff were not to be taken by the jury as a set-off for those published by the defendants, yet if they were offered as evidence of cause and effect, to shew that the defendants were thereby provoked to libel the plaintiff, that they were admissible in evidence. *Erle* upon this put in an affidavit from the Stamp Office, dated 29th June, 1833, made by the plaintiff and another as the proprietors of the *United Service Gazette*, and a copy of the *United Service Gazette* deposited at the office, corresponding with the imprint and names of printers and publishers mentioned in the affidavit. It was also proved, that in

In an action of libel the defendant cannot, in mitigation of damages, put in newspapers deposited at the Stamp Office, under 38 Geo. 3, c. 78, s. 17, containing libels on himself by the plaintiff, for *non constat* that any such newspapers were published, or came to the knowledge of the defendant.

Nor can the defendant put in the copy of a work published by the plaintiff, unless to shew that such work came to his knowledge and provoked him to write the libel.

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1833 the plaintiff was the editor of the Alfred newspaper, and that in May, 1833, he became the co-proprietor of the Old England newspaper, and wrote articles in it, one of which, entitled "The Conversazione," appeared August 1833. This article reflected severely on *Fraser's Magazine*, and there was some evidence that the plaintiff was the author of it. It was then proposed to read this article in the United Service Gazette, from a copy produced from the Stamp Office. Sir *F. Pollock*, for the plaintiff, objected that the 38 *Geo. 3*, c. 78, which made the production evidence for certain purposes, did not apply to the present case. The Lord Chief Justice was of this opinion, and rejected the evidence. Copies of the Alfred and Old England, at the time they were edited by the plaintiff, were then tendered in evidence from the Stamp Office, which it appeared the printer of the plaintiff had deposited there by orders of the plaintiff, and which were signed by the printer; and it was proved, that in the copy of the Alfred produced, there was an article reflecting on *Fraser's Magazine*, which it was proved the plaintiff had previously read over in manuscript to a witness; but as it did not appear the copy produced had ever been seen by the plaintiff, his lordship rejected them. A copy of the Literary Souvenir, bearing the imprint of 1832, was also tendered in evidence, which the publisher swore to be, in his belief, one of the numbers published by him in that year, but it was likewise rejected. The jury found for the defendants on the first count; and for the plaintiff on the second, with 150*l.* damages.

In Hilary term, 1836, *Erle* obtained a rule nisi for setting aside the verdict, and for a new trial, upon the ground of the evidence being improperly rejected.

Sir *J. Campbell* A. G., Sir *F. Pollock*, and *Barstow*, on a former day (*a*) in this term, shewed cause. It may be admitted

(a) May 29th, before Lord Denman C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

that evidence of the plaintiff, in an action of libel, having written provocatory libels on the defendant, is receivable, but still it is not evidence to be favoured. The defendant seeks to prove that articles in the United Service Gazette and other journals, affording such provocation, were edited by the plaintiff, by producing from the Stamp Office an affidavit by plaintiff, stating that he was the proprietor of those journals, and by the production of the journals themselves from the Stamp Office. It is clear this forms no evidence of publication against the plaintiff at common law, the question is, does it under the 38 Geo. 3, c. 78? The first section of that act requires that no person shall print or publish a newspaper until an affidavit specifying the names and abodes of the printer, publisher and proprietor be deposited at the Stamp Office. Then section 9 specifies that these affidavits, or certified copies of them, "*shall, in all proceedings civil and criminal, touching any newspaper which shall be mentioned in any such affidavits, be received and admitted as conclusive evidence of the truth thereof.*" It is clear from this language that the only cases meant where these affidavits shall be produced, are prosecutions or actions "*touching any newspaper*" mentioned in the affidavit. Now the action here is for a libel in *Fraser's Magazine*, and the United Service Journal comes in quite collaterally. First of all then, the certified copies of the affidavits which were produced, were not admissible at all. But supposing the original affidavit had been produced, at common law it would only have been evidence, that on that day the plaintiff was the proprietor of the United Service Journal, and it would not bring to him the publication of other libels on subsequent days. Section 11 of the 38 Geo. 3, indeed, carries the effect of the affidavit further, as it enacts, "*that after the production of such an affidavit, and of a newspaper corresponding to the one described in the affidavit, it shall not be necessary to prove that the newspaper was published by the defendant;*" but this is only on the occasions, and by the parties specified


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in the section, viz. the plaintiff, informant, or prosecutor, or person seeking to recover any of the penalties given by the act, and the case of a defendant is carefully omitted. But the 17th section will probably be relied upon, which enacts "that in case any person shall make application to the commissioners in order that such newspaper, so signed by the printer or publisher, may be produced in evidence in any proceeding, civil or criminal," the commissioners shall deliver the same to be produced. But that enactment does not make the production of a newspaper from the Stamp Office evidence; it only says, the paper shall be produced: if it can then be connected with the newspaper mentioned in the affidavit, and in section 9, the case is still incomplete, for it is only in the cases specified in section 11, that the production of the paper dispenses with proof of publication by the party charged. The defendant is not within the 11th section, and therefore he ought to shew, by distinct proof, that the plaintiff published the libels in question, and that those libels were the cause of the defendant's publication. All the proof of publication as to any of the newspapers is, that the plaintiff's printer signed each copy day by day, and sent them to the Stamp Office. But each copy is a publication; there is no evidence that any more than that one sent to the Stamp Office was published, and the defendant ought to shew that that very copy produced came to his notice. The defendant alleges that he was provoked by the publication of a libel by plaintiff. Suppose that the rules of pleading required that this should have been pleaded, with a *profert in Curiam*, how could the defendant make *profert* of a copy in the Stamp Office, which he had never seen? It is clear, therefore, that the Stamp Office copy could not prove his plea. If it were even proved that the plaintiff was the author of the article, and that the copy produced was signed by himself, still it would not be admissible, for the defendant could not prove he had ever seen it. What difference can it make whether the libel be

in print or writing, each should be proved to have been published, and that it was the cause of the defendant's libel. The copy produced from the Stamp Office may have been the only copy printed, or it may have contained the objectionable paragraph which was struck out in all other copies, and never published. It will be observed, that the statute requires the deposit of every paper printed, as well as published. If the libel were published by the plaintiff, there would have been no difficulty in proving the publication had come to the eyes of the defendants, by producing a copy from the file kept at the club or coffee-house frequented by them.

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*Erle* contra. It is not necessary to discuss the rule laid down at *Nisi Prius*, as to the reception of libels by the plaintiff in evidence, though a somewhat different ruling appears to have been adopted by *Tindal* C. J., at the same sittings, in *Tarpley v. Blabey* (a), but both are perhaps reconcileable with the decision in *May v. Brown* (b). But in the construction of the 38 *Geo.* 3, c. 78, there is nothing whatever to confine the benefit of its enactments to plaintiffs and prosecutors. It was passed in furtherance of justice, and to obviate the difficulties experienced in discovering who the proprietors and publishers of newspapers are. It is quite clear, that a person in the situation of this defendant is quite within the mischief intended to be remedied. The question most discussed has been, whether the defendant can rely on the copy of the newspaper produced from the Stamp Office. It is contended he can. Those copies are produced under section 17 of the act; they were deposited as a public duty, and they stand in the same position as if they had been left with a private individual, in pursuance of a contract, by the plaintiff. It is then shewn that these newspapers correspond in all respects with those mentioned in the plaintiff's affidavits. It has been con-

(a) 2 Bing. N. C. 437.

(b) 4 D. & R. 670; S. C. 3 B. & C. 113.



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tended, that if a paper purchased from the plaintiff's office had been produced, it might have been evidence under the common law rule. But there would be great inconvenience in proving that any particular copy came to a party's eyes. For this reason the legislature provided, that production of a copy from the Stamp Office, corresponding with that mentioned in the affidavit, should be evidence. [*Patteson J.* Your argument is good upon the supposition that a deposit at the Stamp Office is a publication.] Every paper produced was signed by some one or other on behalf of the plaintiff. It is submitted, that there is nothing to exclude defendants from the benefit of section 11, and that if that section was not in the act, section 17 would allow the papers produced to be given in evidence. [*Patteson J.* There is no enactment that the copy deposited shall be produced for any purpose; the words "any proceeding, civil or criminal," do not mean every proceeding in which a party may apply for the production.] The only purpose for which production could be required must be, that it should be given in evidence. But the very printing of a newspaper is a publication, as each copy is one of several original duplicates. In *Baldwin v. Elphinston* (a), it was held that printing a newspaper must be understood *prima facie* to be a publishing, as it must be delivered to composers &c. [*Patteson J.* That case was in the Exchequer Chamber, and the opinion seems extra-judicial, for I do not see what a Court of Error could have to do with evidence.] The Court must have taken cognizance that a newspaper has general circulation as one of so many original duplicates. There is also some distinction between the papers tendered in evidence. In the Old England an article appeared, the manuscript of which the plaintiff had read to a witness before publication. The copy produced from the Stamp Office must be taken to have been generally circulated. In the Alfred of January, 1833, the printer knew that copy was furnished to him by the plaintiff, and that he printed

(a) 2 W. Bl. 1037.

it by his orders. In *Rex v. Hart* (a), the production of a newspaper from the Stamp Office, corresponding with the one described in the defendant's affidavit, was held to be sufficient proof of publication in a criminal case; and how can the law of evidence differ in one case from another? The last publication tendered was a copy of *The Literary Souvenir* of 1832, and the publisher had no doubt that it was one of the copies published by him. On these facts it should have been left to the jury, whether the publications containing libels on the defendant had not come to his knowledge.

*Cur. adv. vult* (b).

LORD DENMAN C. J., on a subsequent day in this term, delivered the judgment of the Court.—In this case the question was, whether publications reflecting on the defendant should have been left to the jury; the object of which was to shew that the defendants had published the libel on the plaintiff, for which the action was brought, in consequence of the provocation occasioned by libels of the plaintiff. In order to make such libels evidence, it must be proved that they came to the knowledge of the party said to be provoked thereby. It is clear that the defendant can not otherwise avail himself of them. But a prior objection was taken, viz. that there was not any proof of the publication of these libels, for, first, the newspapers could not be received, as the only proof of any publication was, that they had been deposited at the Stamp Office, and that there was nothing by which the defendant's acquaintance with the contents could be inferred, there being no evidence of any duplicate having come out. The Court cannot infer from the publication of a newspaper in this way, that others

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(a) 10 East, 94; and in *Rex v. Amphlett*, 6 D. & R. 125; S. C. 4 B. & C. 35, the delivery of a newspaper to the officer at the Stamp Office, was held to be a sufficient

publication to maintain an indictment for libel.

(b) The 38 Geo. 3, c. 78, is repealed and re-enacted, with additional clauses, by 6 & 7 W. 4, c. 76.

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have come out. Secondly, as to the work, of which one copy was produced, we think there ought to be some evidence that the book produced came to the knowledge of the defendant. The case of *Baldwin v. Elphinston*(a) is somewhat against the view now taken by the Court, as it was there held, that printing is, by itself, a publication, because the copy must have been given to the compositors. But we think that is not correct, as the writer of a libel may print it himself.

Rule discharged.

(a) 2 W. Bla. 1037.

Monday,  
June 12th.

THE KING v. COZENS.

Where there are several quo warranto informations pending against the aldermen of a borough, founded on the same objection of title, the Court has not the power to make a rule binding either party to submit to the result of the first information tried.

SIR J. CAMPBELL A.G. had obtained a rule calling upon the prosecutor to shew cause why the proceedings in the quo warranto information against the defendant, for acting as an alderman of Norwich, should not be stayed till after the trial in *Rex v. Brightwell*, against whom a similar information was pending, as also against twelve other aldermen of Norwich, all founded on the same objection.

Sir W. W. Follett and Kelly now shewed cause, and offered to make the rule absolute, on condition that the defendant should be bound by the verdict in *Rex v. Brightwell*. [Sir J. Campbell A. G. On condition that the prosecutor be bound also?] No; that term cannot be imposed on the prosecutor. It was held in *Doyle v. Anderson* (a), in a consolidation rule on a policy of assurance, that the plaintiff cannot have such a limitation forced upon him.

LORD DENMAN C. J.—We should be very glad to make the trial in *Rex v. Brightwell* final, if we could; but we do not think that the Court has power to make it compulsory on either side.

Rule discharged.

(a) 4 N. & M. 873; S. C. 1 A. & E. 635.

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DOE, on the demise of THOMAS SHERIFF, Clerk, and others, v. COULTHRED and BALDREY.

**EJECTMENT** to recover six acres of land and two cottages at Clapton, in Suffolk. At the trial before *Bolland B.*, at the summer assizes, 1835, at Bury St. Edmund's, the counsel for the lessors of the plaintiff relied on a demise from the heir at law of the surviving trustee of the will of one *William Daniel*. By this will the testator devised all his freehold and other estates in Suffolk (part of which were the premises in question), and certain specified estates in Essex, to his trustees therein named, and the survivor of them, in fee, upon trust for absolute sale; in trust, as to the produce of such sale, to lay out the same in the purchase of other lands in Essex, contiguous to certain other specified estates in the same county of Essex belonging to the testator; and then in trust to permit his son *William Barker Daniel* to receive the rents, for his life, of the said other estates in Essex, and of the premises so to be purchased in Essex in pursuance of the said directions in his will, from the produce of the sale of the said particular estates in Suffolk and Essex; with remainder of such several and respective estates in Essex, on the death of the said *W. B. Daniel* without issue, to his natural son, *Thomas Daniel*, in fee. The trustees, instead of selling the lands in Suffolk according to the directions in the will, suffered *W. B. Daniel* to receive the rents and profits of the Suffolk property, and to deal with it as his own during the whole of his life. The plaintiff proved that the land in question had been occupied under *W. B. Daniel* by a person named *Baker*, who had occupied for fifty years previous to his death, which happened in 1828; upon which his son occupied it under a lease from *W. B. Daniel*, and paid rent to

Lands in C. were devised to trustees for absolute sale, in trust to purchase other lands at A., and to permit *W. D.* to receive the rents of the so purchased lands for his life, with remainders over. *W. D.* granted an annuity, arising out of certain lands (C. amongst others), and in the annuity deed recited the above will,—that the trustees had not sold the lands in C., and that the trustees had permitted him to receive the rents. In an ejectment, brought by the trustees under the will, for the lands in C., *W. D.* having been shewn to have been in receipt of the rents and profits during his lifetime,—Held, that the annuity deed was admissible in evidence, as containing a declaration by *W. D.* that he did not hold in fee.

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the defendant *Coulthred*, (to whom it was stated that *W. B. Daniel* had sold the property as his own.)

Receipts of payment of rent by *John Baker*, signed by agents of *W. B. Daniel*, from 1778 to 1820, were then tendered in evidence. The counsel for the plaintiff then tendered an annuity deed from *W. B. Daniel* to one *John Watier*, dated October 1, 1813, in which *W. B. Daniel* recited the will of his father *W. Daniel*, and described the property at Clapton as land directed to be sold, but that it had not been sold, and that he received the rents and profits by the permission of the trustees under the will; and it was contended, on the authority of *Doe v. Pettett (a)*, that as *prima facie* evidence of a seisin in fee had been shewn in *W. B. Daniel*, by his receipt of the rent, and as the defendants claimed under him, admissions by *W. B. Daniel*, cutting down that estate, were admissible. This evidence was objected to; but the learned baron admitted it, reserving the point. The verdict passed for the lessors of the plaintiff. *Storks Serjt.* having obtained a rule nisi for setting aside the verdict for the plaintiff, and entering it for the defendant, or for a nonsuit,

*Kelly* now shewed cause against it (*b*). *W. B. Daniel* having been shewn to be in receipt of the rents and profits, which was *prima facie* evidence of a seisin in fee, the result of the authorities shews that any declarations by him tending to cut down that estate, were admissible. The defence set up at the trial, but not proved, was, that *W. B. Daniel* had represented himself as owner in fee of the estate, and had sold it to the defendant *Coulthred*. Either *Coulthred* claims under *W. B. Daniel*, or he does not. Supposing then that *Coulthred* came in under *W. B. Daniel*, the declarations of the latter, cutting down the estate, would be evidence against him: or supposing that *Coulthred* claims

(a) 5 B. &amp; Ald. 223.

man C. J., *Littledale, Patterson,*(b) May 29th, before Lord Den- and *Williams Js.*

as a wrong-doer, still the declaration of *W. B. Daniel*, contained in the annuity deed, was admissible, as being that of the tenant in possession. This is fully proved by *Holloway v. Rakes(a)*. In that case the lessor of the plaintiff claimed as devisee under a will, under which there had been no possession, and therefore seisin in the devisor was necessary to be proved. For this purpose a witness was called to prove the declarations of the tenant theretofore in possession, "that he held under the devisor;" and the evidence was held admissible. The principle on which that case is founded, is, that a party in possession must be taken to be seised in fee till the contrary is shewn; and therefore that any declaration by him, tending to cut down the estate in fee, is admissible, as being against his own interest. The same principle was acted on in *Peaceable v. Watson(b)*, in *Carne v. Nicoll(c)*, and *Doe d. Human v. Pettett(d)*. [Lord Denman C. J. There was a case of *Woolway v. Rowe(e)*, lately in this Court, where the effect of declarations by a party identified in interest with the plaintiff was considered.] In *Carne v. Nicoll(c)* it was contended that statements of a deceased occupier are not evidence to shew the title of another; but *Tindal C. J.* said, "The expressions in question, which fell from a tenant in possession of the premises, and so as to cut down his own title, are clearly admissible."

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*Storks Serjt. and Gunning, contra.* In this case the will was in evidence, by which it appeared that the trustees were directed to sell those lands absolutely, and that *W. B. Daniel* had no title at all. The declarations relied upon therefore tend to enlarge, rather than to cut down his estate. The will having directed the trustees to sell, the Court will infer that they did their duty; and if that

(a) Cited in *Davis v. Pearce*, 2 T. R. 53.

(b) 4 Taunt. 16.

(c) 1 Bingh. N. C. 430.

(d) 5 B. & Ald. 223.

(e) 3 N. & M. 849; S. C. 1 A. & E. 114.

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be so, although *W. B. Daniel* be found in possession of lands in the same parish, the inference is that they are not the same lands: therefore *Doe v. Pettett* (a) falls to the ground. In *Outram v. Morewood* (b) it was held, that entries by a deceased landlord, in his books, of receipt of rent for a particular estate, are not evidence to prove the identity of the land, in an action between two others. In *Woolway v. Rowe* (c), referred to by the Court, the identity of interest between the parties was clearly made out.

*Cur. adv. vult.*

Lord DENMAN C. J., on a subsequent day in this term, delivered the judgment of the Court. After stating the facts, his lordship proceeded thus:—A rule nisi for a new trial was granted on the question, whether certain evidence was admissible, namely, a deed executed by *W. B. Daniel*, for raising a sum of money to be secured by annuity on these premises, in which the will was recited;—that the trustees had not sold,—and that *W. B. Daniel* was in possession by permission of the trustees. The learned judge admitted the evidence. We think he was right, on the principle that *W. B. Daniel* being once shewn to be in receipt of the rents and profits, his declaration in the deed, that he held under and by the permission of the lessor of the plaintiff's ancestor, was in derogation of his own apparent right to be considered as the owner in fee. We cannot look at the equitable relation in which the parties stood to each other. The sole question is, in whom the legal estate resides? We think the admission of the person in receipt of the rent, that he held under another, whether as tenant by sufferance or as receiver of the rents, is undoubtedly evidence that he himself is not the owner of the legal estate. Then there is proof here *aliunde* that the lessor of the plaintiff had the

(a) 5 B. & Ald. 223.  
 (b) 5 T. R. 121.

(c) 3 N. & M. 849; S. C. 1 A. & E. 114.

legal estate under *W. Daniel's* will, and it is also proved that the father of the defendant was in possession in the lifetime of the testator.

Rule discharged.

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THE KING v. STARKEY.

*Wednesday,  
May 31st,  
and Thursday,  
June 1st.*

**INDICTMENT** for a nuisance, in erecting stalls in a public street in the town of Keighley. Plea: not guilty. The bill of indictment had been found at the Yorkshire spring assizes in 1835, and was removed into the Court of King's Bench by certiorari. At the trial, before Lord Denman C. J., at York, at the spring assizes, in 1836, it appeared by a copy of a charter roll of 33 *Edw. 1*, that *Edw. 1* granted to *Henry de Kyghelay*, "that he and his heirs for ever may have one market every week, on Wednesday, at his manor of Kyghelay, in the county of York." He also had the grant of a fair by the same charter. The market has ever since been held on Wednesday, in the town of Keighley, in a public street called Church Street, but as the town had of late years increased in size, the site was found very inconvenient, and the Earl of *Burlington*, who is lord of the manor of Keighley, and a lineal descendant from the grantee of the market, and who, with his ancestors, had regularly held the market, appointed a clerk, and exercised other acts of ownership, gave notice, on the 9th June, 1834, that the market would be moved from the open street, where it had been hitherto holden, to a new market-place within the manor, (specifying where,) on the 25th June following; and that, after the public notice, all persons who should enter the public streets for the purpose of using them as a market overt, or who should set up any stalls or stands for the purpose of exposing any goods to sale, in any other place within the manor, and not in the new market-place, would thereby become trespassers, and liable accordingly, for any obstruction thereby created to householders or

1. The owner of a market may remove it to any convenient place within the manor, but upon removal he demises the new site of the market and soil, so as to prevent himself from having the control of the market, the removal is void.

2. If the grantee of a market remove it to an inconvenient place, the public may use the old market; and it is not necessary to proceed by *sci. fa.* to repeal the grant.

3. *Semble*, that the lord of a market cannot claim stallage as of common right, when none had been previously paid.



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others passing through the said street. It appeared also, that Lord *Burlington* had granted a lease of the new market to certain lessees, and that tolls had been, on the first removal of the market, demanded and taken by them; (no tolls, nor any payment for stallage, having been ever taken at the old market;) but subsequently public notice was given that the new market was toll free. The obstruction proved against the defendant was, that he continued to frequent the old market-place. Upon these facts the counsel for the defendant contended, that although on the authority of *Curwen v. Salkeld* (a), a lord of the manor with the grant of a market, has a right to remove it to any place within the manor, the removal must be to an equally convenient spot; that the new market-place here was not equally convenient, tolls having been demanded at the new, whereas none ever had been taken at the old market. He also contended that the removal must be to the lord's own soil, where he could have the direction of the market, and that here the soil was in the lessees, who could demand tolls, and even exclude the public. The Lord Chief Justice reserved these points, and the verdict passed for the crown.

A rule nisi was obtained accordingly by *Alexander*, in Easter term, 1836, for setting aside the verdict, and entering it for the defendant.

At the trial, the lease from Lord *Burlington* was not put in, but in the discussion on the rule it was taken as if it had been given in evidence at the trial.

Lease from  
Lord *Burlington*  
of the new  
market-place.

The lease, dated August 13, 1833, was made between the Earl of *Burlington* of the one part, and *Greenwood* and others of the other part, and recited, that in consideration of the rents to be paid, and of the buildings covenanted to be erected, the Earl demised to the said lessees "all that piece or parcel of ground situate in Denbeigh Square, in Keighley, in the county of York, for the purpose of erecting a new market-place for the town of Keighley; together also with the privileges which the said earl may have in obliging

persons exposing goods for sale openly in any of the different streets in Keighley aforesaid, to remove the same into the said intended new market, so to be erected as aforesaid," to have and to hold the same for the term of 60 years, at the rent of 10*l.* per annum. (Covenants by the lessees to pay the rent, to lay out 1000*l.* in building a market-place;) "and also that the lessees, their executors, administrators, and assigns, shall and will at all times hereafter, when the said market has been completed, appropriate and use the said premises as and for a general market, for the said town and manor of Keighley, and the buying, selling, and dealing in marketable commodities as in open market, as now used in the open markets held in the said town; and that they, their executors &c., shall not, nor will at any time hereafter, use or employ the said premises for any other use, purpose, or trade whatsoever, without the previous licence and consent in writing of the said earl; and also particularly that the said premises shall be open for public resort and the purpose of such markets, on such days of the week as the said markets and the fairs of Keighley are now held, and any other days or times, weekly or otherwise, as the lessees shall choose so to use the same; during which periods of open market, all persons shall be at liberty to attend the same, and enter in and upon the said premises, for the purpose of buying and bartering in the said market, without the least molestation or hinderance, or necessity of licence first had and obtained of or by the said lessees.

But nevertheless, with full power for the said lessees to make all such orders and regulations for the maintenance and good management of the said markets, and the renting of the stalls or other conveniences thereof, and imposing rents or other sums as and for licence and permission of vending, selling, or exposing goods to sale on the said premises; to deny entrance to the said premises, for any such purpose, (to) all persons not so authorized, and the exclusive enjoyment of all rents and profits to arise thereby, and of

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Covenants by lessees to use the site demised as a market-place.

Covenants to keep the market-place open for the public on the accustomed days.

Power to the lessees to impose rents and other sums for the licence of vending at the market.

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and from the said premises, as to the said lessees &c. shall seem meet and proper.

Proviso for re-entry and forfeiture for breach of any of the covenants by the lessees.

Proviso for re-entry.

First point:  
Nothing in the  
lease to cause  
obstruction.

*Cresswell, Wightman, and Baines*, now shewed cause against the rule. It is quite clear that the lord of a market may remove it to any other spot within the manor, provided it be equally convenient; *Rex v. Cotterill* (a), *Curwen v. Salkeld* (b). The site of the new market here was equally convenient. It is true that toll had been taken at the new market, but the claim to take it had been abandoned before the prosecution was commenced. It is contended, that by a lease of the soil of the new market, the defendant might be subjected to an action of trespass for frequenting there, but that is not so, for the lessees are bound by their covenants to use the land as a market. The lord has only conferred on the lessees the privilege of using what he himself had; it is not to be presumed that the lessees will use the demised land wrongfully, so as to exclude the public. [*Littledale J.* If you could make out that the lord had demised the market, it would be another thing; but it is not so; the lease is only a demise of the soil.] The effect of the lease is to grant the market, and to enable the lessees to take stallage; for although the lord could not take toll at the old market, no stall could be erected without payment, either in the old market or new, for stallage is payable of common right. [Lord Denman C. J. Could stallage be demanded when there was no evidence of its having been taken for 500 years?] It is apprehended that it might, as it is incident to the lord as owner of the soil; *Bac. Abr. Fairs and Markets*, (D); and it goes to the youngest son, where the land descends in borough English, although the market would descend to the eldest as heir at law; *Heddey v. Welhouse* (c). [Lord Denman C. J. It is said in a case from

(a) 1 B. & Ald. 67.

(c) Moore, 474.

(b) 3 East, 538.

the Year Book, cited in *Vin. Abr.*, that stallage must be certain, but how can there be any certain stallage in this case, where none has ever been paid?] In *Bacon* (*ubi supra*) it is laid down, that picage and stallage are uncertain. In the late case of *Tyson v. Smith* (a), the custom was only to pay stallage when it should be demanded.

If the lord had done all the acts in the new market which it is alleged the trustees may do, that would have been no defence to the defendant, nor would it have been if he had demised the market to the trustees, not for years, but for ever: why then should it be different in the case of a demise for years? It is not at all pretended that the defendant has received any obstruction in the new market, and therefore it does not come within the case of *Prince v. Lewis* (b), where it appeared that the Duke of Bedford had excluded the public from part of Covent Garden Market.

But, at all events, supposing that by this lease Lord Burlington has restricted the right of public access to the market, it furnishes no defence to the present indictment. The proper course would be to proceed to repeal the letters-patent granting the market, by *scire facias*. This appears from *Bac. Abr. Fairs and Markets*, (C), and from *Rex v. Cotterill* (c). Lord Ellenborough C. J. there, after laying down that the power of removal was incident to the grant of a market, said, "If indeed the removal be to an inconvenient place, that would lay the foundation of a *scire facias* to repeal the grant."

*Alexander and Bliss*, contra. Although the lord of a market has the power of removing it as incident to his grant, it must be to some place on his own soil. This was the case in *Curwen v. Salkeld* (d), where the removal was held good; and in *Rex v. Cotterill* (c), where the right of removal was also discussed, it is clear that the corporation there,

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Second point:  
The lessees  
had only the  
powers de-  
mised to them  
which the  
grantor pos-  
sessed.

Third point:  
If the grantee  
of a market  
obstructs the  
public use of  
it, the remedy  
is by *sci. fa.*  
to repeal the  
grant.

Second point:  
The grantee of  
a market can  
only remove it  
to his own soil.

(a) 1 N. &amp; P. 784.

(c) 1 B. &amp; Ald. 67.

(b) 8 D. &amp; R. 121; S. C. 5 B. &amp; C. 363.

(d) 3 East, 538.

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who were lords of the market, had fixed the market on their own soil. Lord *Ellenborough* C. J. said, there "the power of removal is incident to the grant, provided such removal be not prejudicial to the object of the grant." The fair inference from that is, that if the lord remove to a spot not equally beneficial, namely, to land not under his control, the right of removal does not exist.

First point.

*Prince v. Lewis* (a) shews, that though the lord of a market has certain rights, he has also certain duties to perform to the public in respect of those rights; and in *Mosley v. Walker* (b) the same law is laid down by *Bayley* J., in these words: "I take it to be implied, in the terms in which a market is granted, that the grantee, if he confine it to particular parts within a town, shall fix it in such parts as will from time to time yield to the public reasonable accommodation; and that if the place once allotted ceases to give reasonable accommodation, he is bound, if he has land of his own, to appropriate land on which to hold it, or if not, to get land from other people, in order that the market, which was originally granted for the benefit of the public, as well as for the benefit of the grantee, may be effectually held." Lord *Burlington* therefore should have produced the lease at the trial, to shew that he had duly removed the market. If it had been produced, it would have appeared that the lessees might exclude from the market any one who would not pay rent for the licence of selling, or for stallage, or other sums imposed by the lessees—payments which were never heard of in the old market. [*Littledale* J. In the form of a declaration by the lord of a market, for the disturbance of his franchise, of which I find a precedent in *Mosley v. Walker* (b), it is clear the lord must aver that he has, and of right ought to have, the correction of the market. Now that being a necessary averment, if he moves the market to a spot not his own soil, it is clear he cannot have that correction which a lord of the market ought to have.] That is so.

(a) 8 D. & R. 121; S. C. 5 B. & C. 363.

(b) 9 D. & R. 863; S. C. 7 B. & C. 40.

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As to proceeding by scire facias, it is clear that the defendant was entitled to use the old market if the removal were not properly made, and it was for the lord to shew that the removal was good. In *Rex v. Smith (a)*, where there had been a user of a market for twenty years, Lord *Ellenborough* held that that was an answer to the criminal part of the charge; and *Holcroft v. Heel (b)* is to the same effect.

LORD DENMAN C. J.—This is an indictment for obstruction to a highway, by placing down stalls and exposing goods to sale in a street in the town of Keighley; and it appears that the spot in question has been the site of a weekly market, to which the defendant has the right to resort, unless the market has been properly removed by the lord of the manor. The question therefore turns entirely upon the legality of the removal of the market, for if the removal has been so made that any part of the public is deprived of the rights they enjoyed at the old market, the removal is not valid in law. It seems to me, without going First point. through all the provisions of the lease, that there is one clause in it which is so clear an encroachment on the rights of the public, that it is impossible to say that the market has been well removed. That clause, after containing a covenant by the lessees, that all persons shall be at liberty to attend the market on market-days, adds, “but nevertheless with full power, liberty and authority, for the lessees to make all such orders and regulations for the maintenance and good management of the markets, and the renting of the stalls or other conveniences thereof, and imposing rents or other sums, and as and for licence and permission of vending, selling or exposing goods to sale on the said premises, to deny entrance to the said premises for any such purpose (to) all persons not so authorized, and the exclusive enjoyment of all rents and profits to arise thereby, and of and from the said premises, as to them the said lessees shall seem meet and proper.” By this clause, therefore, a com-

(a) 4 Esp. 109.

(b) 1 B. &amp; P. 400.

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plete discretionary power is given to the lessees to exact rent for stalls, and to demand any payments whatever for the liberty of frequenting the market. Now it is not in evidence that any stallage at all has ever been paid at the old market, much less any certain sum, which it would seem that stallage must be. It is so essential to persons frequenting a market, that they should have the liberty of erecting stalls, that I think any restriction of this liberty in the new market clearly makes the removal bad. When the lease was first produced, I thought it would probably contain covenants that the lessees should hold the market in exactly the same way as it had been held by the lord, but it is not so, for a discretionary power is given to them to demand payments that had never been made before. Stallage never having been paid at the old market, I am not prepared to say, after a user by the public for some hundreds of years, that it is competent to the lord to demand such a payment for the first time, and it should not be forgotten that a grant of a market is very beneficial to a grantee, even without any tolls being paid. On these grounds I think the removal cannot be sustained, and that the old market still exists.

Second point. LITLEDALE J.—I am of the same opinion. It appears to me, that if the lessees have exactly the same powers over the new market as the lord, still the removal is not good, because the spot to which the market is removed ought to be in the soil of the lord. This is very different from the case cited by Mr. *Wightman*, when the soil descends to the younger son in borough English, but who would take it subject to the market, which descended to the heir at law.

It is necessary for the lord to have the correction of the market, which he could not have if he has leased the land; and if he were to bring an action for the disturbance of his market, he must expressly aver that he had, and of right ought to have, the correction of the market. But by this lease, as far as relates to the lessees, they may use the land for any other purpose; they may subject themselves indeed

to an action on their covenants, by the lessor, or they may create a forfeiture, but the public could obtain no remedy from them, and would be deprived of their right of market. It was said by *Bayley J.*, in *Mosley v. Walker* (a), "that if the land once allotted (by the grantee) ceases to give reasonable accommodation, he is bound, if he has land of his own, to appropriate land on which to hold it; or, if not, to get land from other people, in order that the market, which was originally granted for the benefit of the public, as well as for the benefit of the grantee, may be effectually held." Now here, as the land is not in the lord, but in the lessees, he could not support the necessary allegations in a declaration for disturbance to his market, which shews that the removal is bad.

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PATTESON J.—The short ground on which I decide this question is, that when a grantee of a market removes it to another spot, it must be to a place where the market can be held as free and unrestricted as the old. It is conceded in this case that there was no liability to toll by those frequenting the market and making sales. Whether the lord is entitled to make any claim for stallage, I do not pretend to say; I do not decide that he could not, and much less that he could. But by the terms of the lease the lessees have the power of imposing a toll on all persons for selling or exposing goods to sale; and it is to be observed, that for the benefit of the public, it is quite as important that sellers should be without restrictions upon them as buyers. The lessees covenant first that they will appropriate the demised premises for the buying and selling of commodities in open market, "*as now used* in the old market." If the lease had stopped there, there might have been some doubt in the case, but it goes on to fix the days on which the markets shall be holden; "during which periods of open market, all persons shall be at liberty to attend the same, for the pur-

First and  
 Second points.

(a) 9 D. & R. 863; S. C. 7 B. & C. 40—55.



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pose of buying and bartering, without hindrance or licence;" which words are confined therefore to persons buying only; then there follows the provision enabling the trustees to impose rents and other sums, as and for the licence of selling goods there. As parties selling had no such rent or sums imposed upon them at the old market, it is clear they have not so fair and unrestricted a use of the new market as they had of the old.

WILLIAMS J., not having heard the former part of the argument, delivered no judgment.

Rule absolute.

*Friday,*  
*May 26th.*

BERKLEY v. WATLING, NAVE, and CRISP.

1. In an action by *B.* the consignee of a bill of lading against *W. N. and C.*, ship-owners, for not delivering the cargo, it appeared that *W.* was the consignor and was also the general agent of *B.* the plaintiff; it was held that *W. N. and C.*, the ship-owners, were not estopped by the bill of lading given by the master of the ship, and acknowledging a cargo on board, from shewing that no cargo was actually shipped.

2. *Quere*, Whether there

is any privity between the consignee of a bill of lading and the ship-owners, so as to enable the former to sue, in case the goods mentioned in the bill should not be delivered?

**ASSUMPSIT.** The declaration stated that the defendants were the owners of a ship called "The Search," then lying in the port of Great Yarmouth, and bound from thence to Newcastle; and the plaintiff, at the request of the defendants, caused to be shipped in good order and well conditioned, in and upon the said ship then lying in the port of Great Yarmouth, and bound for Newcastle as aforesaid, and of which said ship one *J. B.* was the master for the intended voyage, divers goods, to wit, 168 quarters of wheat, to be delivered in the like good order and well conditioned at Newcastle (all and every the dangers and accidents of the sea and of navigation of whatsoever nature or kind excepted) unto the plaintiff or to his assigns, he or they paying freight for the said goods 9s. per last, with average accustomed; and in consideration of the premises the defendants then promised the plaintiff to deliver the said goods at Newcastle in the like good order, &c.: Yet the defendants did not convey the said goods on the said voyage from the port of Great Yarmouth to Newcastle, to the said plaintiff or to his assigns, whereby the said goods have wholly been lost to the plaintiff.

To this declaration the defendant *Watling* pleaded non assumpsit.

The two other defendants pleaded jointly, 1st. Non assumpsit.

2nd. That the plaintiff did not cause the goods to be shipped in and on board the said vessel.

3rd. That the defendants did convey the goods alleged to have been shipped on board the said vessel, and on these pleas issue was joined.

The cause was tried at the Summer Assizes for the town and county of Newcastle-upon-Tyne, in 1835, before *Tindal C. J.*, when a verdict was found for the plaintiff for 272*l.* 10*s.* subject to the opinion of the Court on the following case :—

The plaintiff is a corn factor carrying on business at Newcastle-upon-Tyne; the defendant, *John Watling*, was, during the years 1833, 1834, and 1835, a merchant at Great Yarmouth, and during that time consigned from Yarmouth to the plaintiff at Newcastle, several cargoes of corn for sale on commission. The ship called “The Search” had, during those years, been engaged in the coal trade, in carrying coals from Newcastle to Yarmouth, and occasionally bringing cargoes of corn from Yarmouth to Newcastle, from *Watling* to the plaintiff, and other merchants and factors in Newcastle. During that time, and at the time of signing the bill of lading hereinafter mentioned, the three defendants were the owners of “The Search,” whereof one *John Blyth* was the master, and the said *John Watling* the managing owner at Yarmouth. On the 2nd May, 1835, the plaintiff received a bill of lading for 168 quarters of wheat, signed by the said *John Blyth*, then the master of “The Search” lying at Yarmouth and bound on a voyage to Newcastle, which bill of lading is as follows :—

“Shipped in good order and well conditioned by *John Watling*, in and upon the good ship called “The Search,” whereof *John Blyth* is master for this present voyage, and now lying in the port of Great Yarmouth and bound for Newcastle, one hundred and sixty-eight quarters of wheat,

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being marked and numbered as per margin, and are to be delivered in the like good order and well conditioned, at the aforesaid port of Newcastle (all and every the damages and accidents of the sea and of navigation of whatsoever nature or kind excepted) unto Mr. *John Berkley* or to his assigns, he or they paying freight for the said goods nine shillings per last, with average accustomed. In witness whereof the master or purser of the said ship hath affirmed to two bills of lading all of this tenor and date, one of which being accomplished the rest to stand void. Dated in Great Yarmouth, 29th April, 1835.

"*John Blyth.*"

The bill of lading was enclosed in the following letter, dated the 30th April, 1835, addressed by *Watling* to *Berkley*.

"Since mine of the 27th, I am without hearing from you, but anticipating that you can have no objection to the transhipment of the wheat per 'Herring' to 'Search,' I have done so, and annexed or rather enclosed you here the bill of lading. I have suffered more than once by wheat going to Sunderland, and think you will approve of this arrangement. Wheat is moving in almost all the markets, and you may depend is very safe. I should like to put 100 quarters more on board, but you keep me short of money."

*Watling*, by a letter dated 18th April, 1835, addressed to *Berkley*, had inclosed a bill of lading for the same 168 quarters of wheat, signed by the master of a vessel called "The Herring," which letter is as follows:—

"I have your favour of the 16th, and thank you for the arrangement as to my draft. 'The Herring' is bound to Sunderland with some anchors, and I have put 168 quarters of fine wheat on board as per annexed bill of lading, which you will please insure for 350*l.* and remit me a similar amount by return. The vessel will take about 60 quarters more, and if not sailed, and you think the market would suit, I could put the additional quantity on board. Wheat is very low now, and surely worth attention; it would probably do better at Newcastle, I can send you what quantity you like. Say if I should write *Dewar* and Co. as to future insurance."


In answer to which, the plaintiff sent to *John Watling* 200*l.* as an advance on the said wheat mentioned in the bill of lading, by a letter dated 22nd April, 1835, which was duly received by the said *John Watling*. Subsequently *John Watling* wrote and sent to the plaintiff, on the 25th and 27th April, 1835, respectively, the following letters.

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“ I received your esteemed of the 22nd, with bill for 200*l.* to your credit, but it should have been another hundred. Wheat I fancy will soon move right, and some good may be done. I will endeavour to get ‘ The Herring ’ to go to your quay.”

“ I wrote you on the 25th, and have now your esteemed favour of that date. ‘ The Herring ’ will not go to your quay, and as Sunderland is likely to prove a losing market, I purpose, with your permission, to reship the wheat into ‘ The Search ’ or some other vessel, and do hope that this will meet your approbation ; it will not do to lose money, and I know what Sunderland is at times ; the insurance can be transferred.”

“ The Search ” afterwards sailed from Yarmouth and arrived at Newcastle without the said wheat on board. The corn, if delivered at Newcastle by “ The Search,” would have been of the value of 360*l.* or thereabouts. *Watling* was and still is indebted to plaintiff, over and above the sum of 200*l.* so advanced as aforesaid, in the sum of 72*l.* 16*s.* 5*d.*, which sums are now wholly unpaid. On the parts of the defendants *Nave* and *Crisp*, evidence was offered to shew that although the master signed the bill of lading for the corn as aforesaid, yet that no part of the corn was shipped on board of “ The Search ” as therein expressed. This evidence was objected to on the part of the plaintiff, but was received, the question as to its admissibility to be a question in this case. For that purpose the mate of “ The Search ” was called on the part of *Nave* and *Crisp*, who deposed that

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he was mate on the voyage in question, and that "The Search" had no corn on board between Yarmouth and Newcastle on that voyage. If the Court shall think the evidence was not admissible, then the case is to be considered as if the evidence had not been stated.

The question for the opinion of the Court is, whether, under the above circumstances, the plaintiff is entitled to recover. If the Court should be of opinion that he is, then the verdict to stand; if not, then a verdict to be entered for the defendants(a).

First point :  
 A bill of lading  
 conclusive on  
 the ship-own-  
 er, as to the  
 fact of ship-  
 ment.

*W. H. Watson* for the plaintiff. The question in this case is, whether a ship-owner who has acknowledged by a bill of lading that he has shipped goods on board his vessel, can be permitted to deny that any goods have been shipped, when the bill of lading has got into the hands of a holder for value. No instrument is more negotiable than a bill of lading, and any decision affecting its negotiability would be very prejudicial to commerce. There are no cases directly upon the point; the only case bearing upon it is *Howard v. Tucker* (b). In that case it was held, that ship-owners who had given a bill of lading, by which freight appeared to have been paid before the departure of the ship, were estopped from denying against the assignee of the bill of lading that freight had been paid. In *Bates v. Todd* (c), it was certainly held, that a bill of lading is not conclusive; but that case is distinguishable from the present, because the question there was between the shippers of the goods and the ship-owners, whereas here it is between the ship-owners and a *bonâ fide* holder of the bill, not the shipper. The present is like, therefore, the case of a bill of exchange, where want of consideration may be set up between the original parties, but cannot against an indorsee, for value.

(a) The marginal note to the case stated, that "the plaintiff contends that the evidence to contradict the terms of the bill of lading was not admissible, and that the bill of lading is conclusive on the

defendants, that corn was shipped on board as against the present plaintiff, a holder of the bill of lading, for value."

(b) 1 B. & Ad. 712.

(c) 1 Moo. & Rob. 106.

The analogy to a bill of exchange is strong in the present case ; for the bill of lading of " The Search " is substituted for the bill of lading of " The Herring," and therefore the party holding the substituted bill, holds for the original consideration given for the first bill of lading, as he would in the case of a bill of exchange. The contract entered into by the ship-owner on a bill of lading, is an undertaking that he has received the goods on board, and that he will deliver them at their destination. It was contended at the trial that a ship-owner is not liable unless the goods are actually shipped; but that cannot be maintained, for nothing can be clearer than the law as to the liability of the principal on the contracts made by his general agent (a). The distinction runs through the authorities between acts done by *general* agents, and agents with a limited authority. Now the master, to all intents, is the *general* agent of the owners. Where a principal has recognized the act of an agent generally to indorse and accept bills, an indorsement without authority binds the principal. Goods shipped by a bill of lading, ' contents unknown,' does not bind the ship-owners to the statement in the bill of lading, and this is the mode usually adopted by the master to relieve his owners from the terms of the bill of lading (b). By the Factors' Act (c), a party holding a bill of lading has a right to represent himself as the real owner. *Buller J.*, in *Lickbarrow v. Mason* (d), in the House of Lords, describes the mode in which transactions take place on a bill of lading, and he shews most forcibly, that they could not be conducted at all, " unless the property vest in the assignee by the bill of lading." Large sums of money are advanced daily and hourly in London on bills of lading; they are treated when indorsed as bank notes; it is on the faith that the owners are bound, whether the cargo be or be not shipped, that money is so advanced. [*Patteson J.* Is there any instance of an action by the indorsee of a bill of lading against the ship-owner where the goods have not been shipped? You seem

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(a) *Paley, P. & A.* 162.(b) *Abbott on Shipping*, 217.(c) 4 *Geo. 4*, c. 83, amended by6 *Geo. 4*, c. 94.(d) 6 *East*, 20, n.

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to assume that the contract is made between the consignee and the owner, but that is not so; it is between the consignor and the owner. *Moore v. Wilson* (a).] Generally speaking, it is the consignee who alone can bring the action. [*Patteson J.* That is where the goods have been shipped.] There may be no case where the action has been brought without the goods having been delivered on board; but here the bill of lading represents the goods. In *Sargent v. Morris* (b), where a consignor abroad consigned to an agent in this country who had no interest in the cargo, it was held that the action for damage done to the goods on the voyage must be brought by the consignor. That was on the ground that the agent (the plaintiff) had no interest in the goods, and of there being no contract, express or implied, between their consignor and the ship-owner. Here the goods were to be delivered to the plaintiff, he had advanced money on the goods, and had the property in them, and he alone, therefore, could maintain trover. It therefore follows that the contract arising out of the bill of lading for negligence or non-delivery, vests in the plaintiff, the consignee. The ancient doctrine of estoppels does not apply to mercantile transactions; they are governed by the Law Merchant, which has always been adopted by the Courts, of which the law of bills of exchange is an instance; but by the Law Merchant, the defendants cannot be permitted to deny the shipment of the goods. For this *Hawes v. Watson* (c) is an authority; there an acknowledgment by a warehouseman of the title of a party to whom a transfer of goods had been made, but not completed, was held to prevent the warehouseman from shewing that the property had not passed. Here was a case where the party was etopped, although on no grounds could the case be assimilated to the old doctrine of estoppel. The principle deducible from all the cases is, that as against an indorsee or holder for value of a bill of lading, the ship-owner is estopped from setting

(a) 1 T. R. 659.

(b) 3 B. &amp; Ald. 277.

(c) 4 D. &amp; R. 22; S. C. 2 B.

&amp; C. 540.

up that the goods were not shipped, and that he alone can maintain the action.

In this case besides it does not appear that no corn was shipped, for all that the case states is, that "The Search" had no corn on board on the voyage, which is consistent with the corn having been shipped and transhipped.

*Wightman* contra. The only point at all made on the trial, was on the effect of the indorsement of a bill of lading, there was no contest as to the fact of the corn not being on board. [*Littledale J.* It appears clearly by the case, that the plaintiff knew that there was no corn on board.] As to the conclusiveness of a bill of lading, it is not true that there is no case upon it. For it is no more than a receipt or admission by the party that he has received so much corn on board. The general rule as to receipts is, that they are not conclusive evidence against the party, unless the other party has been induced by it to alter his condition; *Graves v. Key* (a). In the case relied on, *Howard v. Tucker* (b), Lord *Tenterden* only held the bill of lading to be conclusive because the parties might have been induced by the representation to give additional value for it; and *Bates v. Todd* (c), and *Skaife v. Jackson* (d), completely prove the position as to receipts. The only case in which the effect of a bill of lading without any goods shipped, was considered by the Court, was in *Lickbarrow v. Mason* (e), where *Buller J.* said, "An argument was used with respect to the difficulty of determining at what time a bill of lading shall be said to transfer the property, especially in a case where the goods were never sent out of the merchant's warehouse at all: the answer is, that under those circumstances a bill of lading could not possibly exist if the transaction were a fair one; for a bill of lading is an acknowledgment by the captain of having received the goods on board his ship, therefore it would be a fraud in the captain to sign such a bill of lading if he had

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Second point:

It does not appear that the corn was shipped.

Second point.

First point.

(a) 3 B. &amp; Ad. 313.

(b) 1 B. &amp; Ad. 712.

(c) 1 Moo. &amp; Rob. 106.

(d) 5 D. &amp; R. 290; S. C. 3 B.

&amp; C. 421.

(e) 2 T. R. 63—75.



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not received goods on board, and the consignee would be entitled to his action against the consignor for the fraud." Now here there has been some fraud on the part of the master or of *Watling*, and it would be very hard that the other defendants, two innocent ship-owners, should suffer. According to this dictum of *Buller J.*, a bill of lading without goods shipped is a fraud, and if a fraud, then the action should be against *Watling* only. All the arguments used to-day might be urged with equal force against the owners of "The Herring," that the bill of lading is *conclusive on them*.

*W. H. Watson* in reply. The general rule is clear, that directly the goods are on board, the property vests in the consignee, and he therefore must bring the action, and not the consignor; *Dutton v. Solomonson* (a). It has been said that the plaintiff might proceed on the same grounds against the owners of "The Herring;" but he took the bill of lading on board "The Search" as a substituted bill, exactly like a substituted bill of exchange. [*Littledale J.* It seems clear that he discharged the owners of "The Herring," for he consented to the transshipment.] In *Abbott on Shipping* (b), the strong resemblance of a bill of lading to a promissory note is pointed out; but if it is necessary for the consignee to shew on each occasion of indorsing a bill of lading, that the goods were actually shipped, its negotiability is destroyed. It was said by *Buller J.*, that a bill of lading without goods shipped, is a fraud; but it is a fraud of the defendants' servant, which does not make them less liable, and it is like the common case of a master authorizing his servant to purchase goods, which he afterwards fraudulently makes away with, but still the master is liable (c). The point made on the other side was the case of a principal and agent, and if *Watling* had been the agent at Yarmouth of the plaintiff, there might have been something in the argument; but this is a case of consignor and consignee, and

(a) 3 B. & P. 582.

(b) Page 383.

(c) See *Rusby v. Scarlett*, 5 Esp. 76.

not of principal and agent. It is impossible to convert the relation of consignor and consignee into one of principal and agent.

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LORD DENMAN C. J.—This is an action brought by the holder of a bill of lading of goods shipped on board “The Search,” against the owners, for non-delivery of the goods. One of the defendants has pleaded non assumpsit; and the other two have pleaded that the plaintiff did not cause the goods to be shipped on board “The Search;” and secondly, that they did convey the goods and deliver them to the plaintiff. The question arises on the first of these special pleas, as the plaintiff contends that the defendants are not at liberty to contest the fact of any wheat being put on board “The Search,” because the bill of lading signed by the master of the vessel, who was their servant, acknowledges the receipt on board. We are therefore to say whether evidence was admissible to contradict that bill of lading, and I think it was. It was for the plaintiff to prove that he had shipped the wheat on board, and this he could only do by making out the defendant *Watling* to be his agent. Under those circumstances, I think it was competent to the defendants to shew whether any wheat was actually shipped or not. This view gets rid of all questions as to the negotiability of the bill of lading, and also as to the conduct of the plaintiff with the owners of “The Herring,” which I think was just as much an estoppel to the plaintiff’s proceeding against the owners of “The Search,” as the bill of lading could be against the latter.

LITLEDALE J.—I am of the same opinion. In order to support the allegation in the declaration, that the plaintiff caused to be shipped on board “The Search” 168 quarters of wheat, it would be necessary for him to put in the bill of lading. But the bill does not shew that the wheat was shipped by the plaintiff, but by *John Watling*; the plaintiff therefore, in order to obviate that objection, must prove that *Watling* was his agent. Then it turns out that the wheat is

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not shipped on board "The Search" at all; but the plaintiff says, the defendants are estopped from setting up that defence. But how are they estopped? *Watling* knew that the goods were not shipped, and his knowledge is the knowledge of the plaintiff. Then how could the bill of lading operate as an estoppel, when the plaintiff knew by his own agent, that the goods were not shipped? Without therefore giving any opinion on the question of the conclusiveness of a bill of lading on a ship-owner, which does not arise here, as *Watling* was the shipper as well as the ship-owner, I think the bill of lading is not conclusive.

PATTESON J.—This is an action by the consignee of a bill of lading against the ship-owners as carriers. I do not recollect to have seen any such action before; but I should conceive, if such an action could be brought, that the declaration would have to set out the original contract between the consignor and the ship-owners, and then an assignment of the contract, according to the custom of merchants, to the plaintiff; but here the declaration does not state any such thing, it merely sets out that the plaintiff himself caused these goods to be shipped. If it had set out that *Watling* had caused the goods to be shipped, and to be delivered to the plaintiff, and that the defendants had promised so to do, the case might have been different; but the declaration states that the plaintiff himself shipped the wheat. How then can the bill of lading be conclusive, when he knew by his agent that the wheat was not shipped at all? This decision will not in any way impede the negotiability of bills of lading between a shipper and a consignee for value, and I should be very sorry to let any thing fall that would have that effect. Here I cannot but treat the plaintiff as a shipper of the wheat, and as one who knew that nothing was actually shipped.

Postea to the defendant (a).

(a) *Williams J.* was sitting in the Bail Court.

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Thursday,  
June 8th.

CLAY v. STEPHENSON and others.

**MONEY** had and received. Plea: non assumpsit. At the trial before Lord *Denman* C. J., at the York summer assizes, 1835, the plaintiff tendered in evidence depositions taken under a commission to examine witnesses at Hamburg. The commission was issued by the Court of King's Bench (a), directed to the judges of the Chamber of Commerce of the city of Hamburg, or any two or more of them, and directed them, "on or before the 11th day of July ensuing the date thereof, to examine" certain persons therein named, upon interrogatories on their oaths, "and that you do take such their examinations, and reduce them to writing, on paper or parchment; and when you shall have so taken them, you are to send the same, without delay, to our Court of King's Bench, closed up under the seals of any two or more of you, distinctly, plainly set together, with the interrogatories, and the writ to be filed of record." The commission also directed them to swear the interpreters and clerks, faithfully to interpret and write the depositions of the witnesses before they were taken. The return made to this commission was entirely in German, with the following heading:

"This is an extract of the minutes to which the certificate indorsed on the commission refers.

"*D. F. Worlée*, Assistant Actuary."

"On this day, Wednesday, the 15th July, 1835, before Messrs. *G. G. F. F. Schmidt* and *D. F. Weber*, members

(a) See 5 N. & M. 318; S. C. 3 A. & E. 807.

Chamber of Commerce, was not a proper return, or receivable in evidence.

2. The commission directed the Chamber of Commerce, or any two of them, on or before the 11th July then ensuing, to examine certain witnesses. The Chamber of Commerce met on the 11th July, and appointed two commissioners to take the examinations, and on the 15th July following the commissioners met and the witnesses appeared before them. *Semble*, that the commission had continuance from the 11th July, as the Court would not intend that the witnesses were not summoned on the 11th, and the commission adjourned till the 15th.

3. *Semble*, that when a commission to examine foreign witnesses is issued to another country, their answers returned to the Court of K. B. must be in English.

1. A commission to examine witnesses at Hamburg was directed to the judges of the Chamber of Commerce of that city, or any two of them, who were directed to take the examinations in writing, and to send the same to the Court of K. B. under their seal. The original examinations were taken down by an officer of the Chamber of Commerce, appointed for that purpose, and entered by him in the minutes of the Court, and these were signed by the judges:—Held, that a copy of the examinations, attested by the above officer, and under the seal of the

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of the Chamber of Commerce at Hamburgh, who, by an order of the same Court, dated the 11th July, 1835, granted at the request of *Dr. M. Pohls*, on behalf of *R. Clay* the younger, of Goole, were appointed as commissioners, whilst by the same order, *D. F. Worlée*, the assistant actuary, one of the sworn officers of the Court, was added to the commission, for the purpose of keeping the minutes." The depositions then followed, as taken in the German language, and the return concluded thus: "Whereby this act was closed and signed by the commissioners. (Signed on the Minutes)

*G. G. F. Schmidt*, Judge of the Court of Commerce.

*D. F. Weber*, Judge of the Court of Commerce.

*D. F. Worlée*, Assistant Actuary."

"The correctness of this act, and that the same entirely agrees with the original minutes, is hereby attested.

(Signed) *D. F. Worlée*, Assistant Actuary."

The following certificate was indorsed on the return itself:

"The Court of Commerce of the free and Hanseatic Town of Hamburgh certifies (or attests) the execution of the herein demanded examinations of the witnesses *Langnese* and *Precht*, by referring to the extract of the minutes annexed herewith.

*D. F. Worlée*, Assistant Actuary."

Various objections were taken to the reception of these depositions, which were repeated in the Court above. The Lord Chief Justice admitted the evidence, and he directed the jury to find for the plaintiff, with liberty to the defendants to move to enter a nonsuit, or for a new trial. *Wightman*, in Michaelmas term, 1835, obtained a rule accordingly, on three grounds: 1st, that the examination of the witnesses were not taken in proper time, as the commission directed them to be taken on or before the 11th July, whereas it did not commence till the 15th July; 2dly, that the return was made in the German language; 3dly, that the examinations returned were only copies; 4thly, that the witnesses were examined on German interrogatories, instead of being exa-

mined on English interrogatories, and the interrogatories and the answers then translated into German. He also moved on the merits of the case, which the decision of the Court renders it unnecessary to go into.

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*Cresswell, Alexander, and Cleasby*, on a former day (*a*) in this term, shewed cause. I. The commission directed the judges of the Chamber of Commerce to examine certain witnesses, on or before the 11th day of July, and the return shews, that on the 11th day of July proceedings were commenced by the Court, under the commission, in order to this examination, which was proceeded with on the 15th following. Supposing the words, therefore, to be compulsory, and not directory, the Court has fully complied with the terms of the commission. But in truth the date was put in merely to expedite the Chamber of Commerce, in order to get their return in time to try the cause at the ensuing summer assizes, and it is clearly immaterial on what day the commission was executed. Lord *Mansfield* has pointed out, that when the time is not essential such a clause is merely directory. "There is a known distinction between circumstances which are of the *essence* of a thing required to be done by an act of parliament, and clauses *merely directory*. The *precise time*, in many cases, is not of the *essence*;" *Rex v. Loxdale* (*b*). So on the act 54 Geo. 3, c. 84, which enacts that the quarter sessions shall be holden in the week next after the 11th October, Lord *Tenterden* held, that these words were directory only, and said, "If there had been negative words, declaring that the sessions should be holden at no other time but that specified, they would have been imperative, but that the words used were only affirmative." *Rex v. Justices of Leicester* (*c*).

First point:  
Commission  
commenced  
in proper time.

II. It is then said that the return should have been made in English. But the commission does not direct that the

Second point:  
Whether the  
return to a  
commission to  
a foreign coun-  
try, to examine  
witnesses, must  
be in English.

(*a*) Friday, June 2, before Lord  
*Denman C. J.*, *Littledale, Patteson*  
and *Williams Js.*

(*b*) 1 Burr. 445.

(*c*) 9 D. & R. 772; S. C. 7 B.  
& C. 6.

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answers should be returned in English. The answers were taken down in German as they were delivered, and an interpreter was present at the trial to translate them. [*Patteson J.* When we send a commission to a foreign country, we expect a return will be sent to us which the Court can take notice of, not one in a foreign language. It is an implied term in such a commission, that the return is to be in English, for it cannot be permitted that foreign documents should be filed on our records.] In the commission in *Atkins v. Palmer(a)*, there was an express provision that the answers of the witnesses should be returned in English, but there was no such provision here.

Third point:  
That the re-  
turn is not an  
original.

III. The return produced was under the seal of the Court of the Chamber of Commerce, the original of which remained on the records of the Court, and which therefore could not have been returned. [*Patteson J.* That was the fault of the parties in choosing to direct the commission to the Chamber of Commerce, which was quite contrary to what was intended by this Court. We expressly said we will not send the commission to the Court of another country, but will address it to the individuals who compose the Court, and who may exercise any process they think fit (b).] It might be that the members of the Chamber of Commerce would not act, unless addressed as a Court. The return produced was equivalent to an examined copy of a record, being made by an officer of the Court. The objection was not taken at the trial that it was not original; and although Lord *Denman* reserved all objections, that only allows objections to be made to defects inherent in the return, for if this objection had been taken at *nisi prius*, it might have been cured. [*Patteson J.* This is an inherent defect in the return, for the commission directs the Court to take the examinations, and to return the same to the Court of King's Bench.] Under these words, it was competent to send an examined copy. In *Atkins v. Palmer(a)*, where a commission was sent to Leghorn, to examine witnesses on in-

(a) 4 B. & Ald. 377. (b) See *Clay v. Stephenson*, 5 N. & M. 318.

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terrogatories, and to reduce the examinations into writing, in the English language, and to send the same to England, it might have been supposed that the only way of complying with this commission would be, to have sent the answers, taken at the time, with the translations then made, but the Court held, that translations of the answers, made six weeks after they were given, were sufficient. *Abbott C. J.* said, that it was to "be presumed that the commissioners, chosen by the parties, had discharged their duty." What greater security can the Court possess of having the proper return, than an examined copy, under the seal of the Court? *Abbott C. J.* said further, in that case, "The commission, in the first place, directs them to take the examinations, and reduce them into writing, in the English language, on parchment, and to send them to the Court of Chancery. Now that cannot be understood to mean that they are to send the identical paper or parchment on which they make their minutes, because the witnesses may occasionally make correction in their testimony. The examinations would necessarily be first taken in a rough manner, and would afterwards be fairly copied out." It is not therefore a literal compliance with the terms of the commission that is required. [*Patteson J.* If we are to take this examination as an examined copy, it is the copy of something remaining at *Hamburgh*, therefore there is nothing returned to us at all. We must take it either as a return or as a copy of a record remaining at *Hamburgh*.]

Sir *F. Pollock*, *Wightman*, and *Cowling*, *contra*. First point.

I. Neither the Court of the Chamber of Commerce, nor the commissioners, did as they were directed by the commission, namely, examine the witnesses there named, *on or before* the 11th July. On the contrary, the two commissioners never met for that purpose till the 15th July, which was four days after the commission expired. The witnesses are directed by the commission to be examined apart. Suppose then they had delayed commencing the examination



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till the 11th, and the examination of the first witness had taken the whole day, they would have no right to examine the other witness on the following day. It is like the case of an arbitrator, who has to make his award by a certain day, and who delays going into it till the last day, thinking he shall be able to complete it then; but if he fail to do so, he would not be able to make it on any later day. [Lord Denman C. J. Suppose the commissioners had met on the 11th, and had adjourned from day to day till the 15th, it surely could not be said then that the commission had expired. *Littledale J.* It seems to me that if the commission were commenced on the 11th, as it appears to have been, it must have continuance like our commission of assize, which must be opened on a certain day, but we are not bound to try all the causes on that day.] It does not appear that the commissioners did any thing on the 11th July; all that was done was this—the Court appointed commissioners to take the case on the 15th. The document itself shews that nothing was done. [*Littledale J.* What is there to shew that the witnesses, who were examined on the 15th, were not summoned on the 11th? We cannot infer that they were summoned on some day between the 11th and the 15th.]

Third point.

III. Then as to the return, it is clear that *Atkins v. Palmer* (a) is distinguishable, for it is not contended here that the clerk's rough notes of what took place should be returned, but a document signed by the commissioners of the examination, as directed by the commission. This return does not even purport to be an original, and therein it differs from *Atkins v. Palmer* (a).

*Cur. adv. vult.*

LORD DENMAN C. J., on a subsequent day in this term, delivered the judgment of the Court.

We decide this case on one short ground. The principal evidence at the trial arose from depositions taken under a commission to examine witnesses. The commission directs

the commissioners to take the examinations and reduce them to writing, and when so taken, to send *the same* to us. Now it is clear that these examinations have not been returned to us; but copies, bearing the certificate of an officer appointed for the purpose. We think the commission ought to be executed in its terms, and therefore that no copy could be received in evidence. There must therefore be a new trial.

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Rule absolute for a new trial.

DOE, on the several demises of JOHN WINDER and MARY his Wife, v. ROBERT LAWES.

THIS was an action of ejectment, tried before Lord Denman C. J., at the spring assizes for the county of Surrey, in the year 1835.

The action was brought to recover possession of one undivided third part of certain copyhold premises, situate at Kingston Bottom, and held of the manor of Ham, in the county of Surrey.

The declaration contained two demises by the lessors of the plaintiff; one on the 24th day of November, 1825; the other on the 31st day of December, 1834. A verdict was found for the plaintiff, subject to the opinion of this Court on the following case.

1. The following bequest in a codicil, "I give, demise, and bequeath to S. (the wife of the testator,) all my copyhold in H." passes only a life estate in the copyhold property, the context not necessarily shewing that such was not the intention of the testator.

2. Where the reversion in fee of a copyhold, expectant on a life estate, vests by devise in the tenant for life, who has been admitted as tenant for life, the life estate is merged, and another admittance in respect of the estate devised is necessary.

3. An heir at law to a copyhold may devise his reversion without admittance.

4. P. seised in fee of a copyhold, devised it to S. for life and died, the reversion descended on his son, who devised it to S. the tenant for life, who had been previously admitted to the life estate, but who was never admitted to the estate in fee. By her will, S. devised the estate in fee to A., B. and C. jointly, the two latter of whom were her heirs at law. The three devisees were admitted each to an undivided third of the copyhold, to the uses of the will of S.:—Held, that the admittance of the tenant for life did not do away with the necessity for another admittance on the descent of the estate in fee, and therefore that S. had not a devisable estate in the copyhold; but held also, that as B. and C. had been admitted to two-thirds of the copyhold, (although admitted as devisees,) yet as they were the heirs of P. the prior devisor, their admittance had relation to the will of the first devisor, and that they were entitled to two-thirds of the estate.

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Mary Winder (the lessor of the plaintiff) is one of three sisters of *Philip Cawston* the elder, hereinafter mentioned, and one of the aunts and coheirresses of *Philip Cawston* the younger, hereinafter mentioned, and claims the property in question, as such coheirress, by descent.

The case then stated the custom of the manor as to descents.

On the 30th November, 1804, the Earl *Dysart*, the lord of the manor of Ham, granted to *Philip Cawston*, the elder, two pieces of the waste part of the manor; to hold to him and his heirs, at the will of the lord, according to the custom of the manor, at the yearly rent of 10s. *Philip Cawston* was thereupon admitted to these copyholds; and on the 5th December following surrendered them to the use of his will.

Philip Cawston had made his will before the above grant was made, namely, on the 29th September, 1791. He afterwards made two codicils, both of which, as also the will, are in his own handwriting. The first of these, dated 28th October, 1799, relates only to personalty; but by the second, dated 20th September, 1805, (which was duly attested,) he devised the property to his wife.

The case then set out his will at length: the following are the clauses material to the present case:—

“ I give and bequeath to *Sarah*, my dearly beloved wife, my freehold in Hertfordshire and estate in Petty France, Westminster; all my right and title to the Robin Hood premises in Kingston Bottom, in the parish of Ham, (county of Surrey,) and all my household furniture, together with my clothes and book debts, and my plate and stock in trade; whom I likewise constitute, make and ordain the sole executrix of this my last will and testament, by her freely to be possessed and enjoyed during her life, and at her demise my children to have equal share. If my loving children die before their mother, *Sarah Cawston*, she is at her free will to give and bequeath the aforesaid property to home (a) she please(u). And I do hereby utterly disallow, revoke and

(a) Sic.

disannul all and every other former testaments, wills, &c., and no other to be my last will and testament. Dated 29th September, 1791. *P. Cawston (L.s.)*”

“ N. B. I likewise give, demise and bequeath to *Sarah*, my dearly beloved wife, all monies in the hand of *Biddulph, Cocks and Ridge*, bankers, Charing Cross, and money that may at any time be put into the Bank of England or lodged elsewhere. October 28th, 1799. *P. Cawston.*”

“ I likewise give, demise and bequeath to *Sarah Cawston*, my dearly beloved wife, all my Copyhold in the hamlet of Ham, in the parish of Kingston and in the county of Surrey, and likewise all monies lent out upon mortgage bonds or notes of hand. *P. Cawston.* Dated this day the 20th day of Sept. 1805.”

Philip Cawston had only two children, viz. *Philip Cawston* and *Sarah Cawston*. The latter died an infant, of the age of six years, some time before her father.

In the year 1811 the testator died, leaving his widow and his son *Philip Cawston* surviving; and his will and codicils were proved by his widow and executrix in the Prerogative Court of Canterbury on the 14th of June, 1811.

On the 15th June, 1812, at a court held for the manor, the homage presented the death of *Philip Cawston*, and at the same court *Sarah Cawston*, by *Philip Cawston* her son, came and brought into court the probate of *Philip Cawston's* will, and was admitted to hold the same accordingly to the will of the said *Philip Cawston*, her late husband, deceased, at the will of the lord, according to the custom, &c.

The said *Sarah Cawston* never surrendered the said premises to the use of her will.

Philip Cawston, the son, was never admitted, as tenant in reversion or otherwise, to the said copyhold premises, nor were they surrendered to the use of his will, which is dated 18th March, 1811, and is in the following terms:

“ I do constitute and appoint my beloved mother, *Sarah Cawston*, whole and sole executrix to this my will; and fur-

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ther, I do hereby bequeath and give unto my said mother and executrix all and singular my whole and sole property I may die possessed of, or having right or title to, in money, goods, clothes, leasehold, copyhold or freehold, bank stock, annuities, mortgages, bonds, notes, or any hereditary property I may either die possessed of or have any legal claim or expectation to the same. As witness my hand and seal, this 18th day of March, in the year of our Lord 1811.

*Philip Cawston (L. S.)* "

Amongst the "Rules of Customes" pertaining to the manor is the following, viz.

"VII. The seventh part of our custom is, that if any tenant which holdeth land of our sovereign lord the king do sue it out of the said court without licence of the lord of the soil, he to forfeit all his copyholde which he hath lying within the lordship, except it be brought out by the commandment of the king or his most honourable counsel, and furthermore, whether he came to it by inheritance or by purchase; and so holding it to him, his heirs or assigns, and so at the hour of his death deliver a surrender to his next heir, and if so be that after the death of any such tenant the heir doth give, set or lay to mortgage, any copyhold land, lying within any of the said lordships, before the said heir be admitted and hath paid his fine, according to the custom and manor of the said lordships, that then their sale, grant, surrender or mortgage, made by the said heir, shall stand clearly void and of none effect by our custome."

*Sarah Cawston* was not admitted under the will of her son, nor did she prove his will. She died on 25th October, 1825; and on 25th February, 1826, letters of administration, with the will annexed, of *Philip Cawston* the younger, were granted to her executors, *Samuel Baxter* and *George Smallbones*.

On the 2nd July, 1824, *Sarah Cawston* made her will, whereby she devised all her estates, freehold and copyhold, to *Samuel Holden*, *Daniel Cork* and *Samuel Baxter*, (the

two last of whom were the nephews and heirs at law,) who at a court of the manor, held on the 18th July, 1826, produced the letters of administration, with the will annexed, of *Philip Cawston* the son, and paid to the lady of the manor their fine upon the neglected admission of *Philip Cawston* the son, and were severally admitted (a) to an undivided third of the copyholds in question.

The question for the opinion of the Court is, whether the plaintiff be entitled to recover. If the Court be of opinion that he is, then the verdict is to stand; if the Court should be of opinion that he is not, then a nonsuit to be entered.

The case was argued in Michaelmas term (b) last, by

*Mansel*, for the lessors of the plaintiff. The reversion in fee in this case did not vest in *Mrs. Cawston* under her son's will, who, it appears, was never admitted to the copyhold in question. Therefore, although the words in the will of *Cawston* the younger are large enough to pass the fee, as he never was admitted, the devise by him was void. The words therefore of the codicil to *Cawston* the elder's will, only, are to be looked at. Now, although he uses the word "copyhold" only, it is submitted that he meant it merely as descriptive of his property, and therefore *Mrs. Cawston* took only a life estate under it; to which life estate *Mrs. Cawston* was admitted. If that be so, *Philip Cawston* the younger was heir at law of *Cawston* the elder, and he, having died before his mother, endeavours to bequeath his reversion in the copyhold to her; but that he could not do, as he never was admitted and never surrendered to the use of his will. The devise to her therefore is inoperative; and *Mrs. Winder* is entitled to recover as one of the heirs at law of *Philip Cawston* the younger.

(a) Meaning that each was admitted to one undivided third of the entirety, as appeared by copies of the court rolls of these admit-

tances, which were furnished to the Court after the argument.

(b) Friday, Nov. 18th, before Lord Denman C.J., *Patterson*, *Williams* and *Cokeridge* Js.

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First point:  
The words  
"all my copy-  
hold" pass the  
fee.

*J. Hodgson contra.* Mrs. *Cawston*, at the time of her death, had a devisable estate in the copyhold in question, either by having taken an estate in fee under her husband's will, or by acts done between her and her son.

I. 'The argument in behalf of the devisee, in the case of *Doe v. Hazlewood* (a), shew that general words like these used in the codicil to *Cawston* the elder's will, are a devise of the testator's whole estate. The rule of construction is, that when the words used may be a description of the whole interest of the testator, they are a devise of his whole estate; if they are merely descriptive of the land, they carry less. In his will he uses these words: "I give and bequeath to *Sarah* my wife my freehold in Hertfordshire, and my estate in Petty France," he also gave all his personalty, but limited that expressly to a life estate with a gift over to the children. He then makes two codicils, by the first of which he gives to his wife other personal property, not limiting the gift to her life; and by the second he gives, demises, and bequeaths to her all his copyhold. Now it must be admitted that when a testator devises all his *estate*, the absolute interest passes. It is to be inquired then, whether, under the words "all my copyhold," the whole interest would pass. If copyhold is an adjective (as it may be as well as freehold), it may be supplied with the word "estate," in which case it is clear Mrs. *Cawston* would take an estate in fee. If it be a substantive it is still stronger against the lessor of the plaintiff; for in his will the testator uses the words "freehold and estate" synonymously to express his whole interest in those properties, giving all his estate in them to his wife for her life: he uses the word "copyhold" in the codicil in the same sense, but without any limitation. The interest which he had in his copyhold was an estate to himself and his heirs, the whole of that therefore he has given to his wife by the codicil. His will shows that he knew how to give a life

(a) 1 N. & P. 352. That case the Court when this case was argued. had not received the decision of

estate only when he wished ; the conclusion therefore is irresistible, that he intended to give his wife his whole estate in his copyhold property. If that be so, the widow was duly admitted, and made her will after the statute 55 Geo. 3, c. 192, was passed.

II. But if it should be held that *Mrs. Cawston* took only a life estate in the copyhold, the reversion after her life estate vested in her son as heir at law, from whom she takes as devisee, for it cannot be disputed that an heir at law can devise a copyhold without admittance ; *Right v. Banks* (a); and in *King v. Turner* (b), Lord *Brougham* approved in strong terms of *Right v. Banks*, and repelled the statement that any new view of legal principles was taken in that case. But it may be urged, that the will of *P. Cawston*, the son, was prior to the statute 55 Geo. 3, c. 192. It is true that in *Doe d. Smith v. Bird* (c) this Court took a distinction between wills made before and after the statute, as regards a devise in general words, holding, that in the former a general devise would not pass unsurrendered copyholds, although the testator was alive after the statute passed. In the present case, however, although the will was made before the statute, it contains an express devise of copyholds. It is therefore clear that an heir may devise without having been admitted.

III. But here, *Philip Cawston* the younger was in law admitted, and that is an important point with reference to another part of the case. In 1812, *Sarah Cawston* was admitted to the copyhold, to hold the same according to the will of her husband; and it cannot be disputed that the admission of a tenant for life is the admission of those in remainder; *Co. Com. Copyholder*, s. 41. In *Church v. Mundy* (d), Sir *W. Grant* M. R. recognized this doctrine, and said that there were many cases establishing that the admittance of the particular tenant was an admittance of the remainder-man. There can be no sound distinction between a remainder-man and a reversioner, for

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Second point :  
An heir at law  
may devise his  
reversion in a  
copyhold,  
without ad-  
mittance.

Third point :  
The admit-  
tance of tenant  
for life is an  
admittance of  
the reversion-  
er.

(a) 3 B. &amp; Ad. 664.

(b) 1 My. &amp; K. 456.

(c) 2 N. & M. 679; S. C. 5 B.  
& Ad. 695.

(d) 12 Ves. 426.



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they are both in of the same seisin with the particular estate. The admittance of the mother therefore was an admittance of the son as heir, if he required any admittance, and it follows that it was an admittance in respect of the same fee; it may be equally proved, that, although the admittance of Mrs. *Cawston* was after the date of her son's will, still it would (if necessary) enure as his admittance prior to his will, for it has been held frequently, that admittance relates back to the surrender in compliance with which it is granted; *The King v. Mildmay* (a), and *Carr v. Singer* (b). In the latter case, *Willes C. J.* laid it down that admittance has a retrospect to the surrender to all intents, so that where there is a will and an admittance, the admittance relates to and has effect from "the time of the surrender, not from the death of the testator." But it is not necessary to carry the doctrine so far in this case, for it cannot be doubted that it would relate to the death of the husband (*P. Cawston, sen.*), at which time his will (under which the wife took) began to operate, and the descent (by which the son took) also operated. *Philip Cawston* the younger, therefore, stood as an admitted heir from the death of his father, and (even laying aside his character of heir) his will was capable of operating on the copyhold. By his will he devises this property in express terms to his mother, therefore the devise does not fall within the distinction taken in *Doe d. Smith v. Bird* (c).

Fourth point:  
 An admitted  
 tenant for life  
 requires no  
 fresh admit-  
 tance, if the  
 reversion de-  
 scends upon  
 him.

IV. It is now to be considered, for the first time, what the effect is of a devise by a reversioner to a tenant for life of a copyhold. If it were a freehold it might operate as an enlargement of the prior estate, and it should be the same in a copyhold. The widow was an admitted tenant at least to an estate for life, and it may be held, that the devise to her in fee was not a merger of the previous estate, if the consequence of its being a merger would be to make a fresh admittance necessary. If *A.* is particular tenant of a

(a) 2 N. & M. 778; S. C. 5 B.  
 & Ad. 254.

(c) 2 N. & M. 679; 5 B. & Ad.  
 695.

(b) 2 Ves. sen. 603.

freehold estate, and *B.* in the remainder, and *B.* releases to *A.*, *A.* is not disseised of his previous estate, but becomes seised of the fee simple, and seised of the same fee of which his former estate was part, existing by the force of the same livery; and although in general there is a merger of the particular estate, it is otherwise when the nature of the particular estate or the intention of the parties precludes a merger. What reason can there be why the same rules should not apply to copyholds; as to which admittance corresponds with livery (both being the investiture of the tenant), and the circumstance of the admittance having been taken, and the lord's fine paid, may well be held to preclude the intention to merge. What ground could there be for a fresh admittance except for fees, as the lord had already accepted *Mrs. C.* as a tenant, and it matters not to him whether she was tenant for life or in fee, as he is always entitled to his fine for admission on the death of the tenant, whether tenant in fee or for life. *Mrs. Cawston* therefore was seised of the whole estate. It is moreover to be observed with reference to this part of the case, that she was admitted as tenant (in doubtful words perhaps), according to the will of her husband; but it is conceded that it could only operate as the admittance of her as tenant for life, if the Court shall decide that she took only a life estate, because even if the admittance were wrongly expressed, it would enure according to her true title (*a*). Nevertheless, her admittance operated through the whole estate then vested in herself and her son; and as that was the same estate which she had at the time of her death, a fresh admittance would have been perfectly nugatory, and could not have been made without a surrender from her, which the lord had no right to demand. Her will therefore gave a good title to the devisees mentioned in it, directly they were admitted, which it is found they have been.

Lastly, the case finds that *Mrs. Cawston* made her will, and devised all her estates, freehold and copyhold, to

(*a*) *Church v. Mundy*, 12 Ves. 426.

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Fifth point:  
The admittance of two heirs and a third person as devisees, enures as an admittance of the two heirs.

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*S. H., D. C., and S. B.* (the two last of whom are her heirs at law), who were severally admitted each to an undivided third of the copyhold in question. Therefore even supposing this will to be inoperative, it is contended that the legal estate would still be in the customary heirs of *Mrs. Cawston*; because, on the principle already stated, the admission of the heirs and the third devisee would, according to *Church v. Mundy (a)*, enure as an admittance of the coheirs only according to their title in fact, and the admittance of the third devisee would be a nullity.

Third point.

*Mansel* in reply. *Sarah Cawston* was only admitted according to the will of her husband; that is, as tenant for life. The admittance of a tenant for life has never been held to go further than to admit a remainder-man. This proposition seemed assented to on all sides in *Doe d. Whitbread v. Jenney (b)*, and a passage from *Co. Com. Cop.* is referred to in the note *(c)*, to shew that the admission of tenant for life is not an admission of the heir. The reason is, that the particular estate of the tenant for life and that of the remainder-man make but one estate. The reversioner comes in on a new estate, upon which the lord is entitled to his fine.

*Cur. adv. vult.*

LORD DENMAN C. J., in this term, delivered the judgment of the Court.—It is admitted in this case, that the lessor of the plaintiff, *Mary Winder*, as one of the customary co-heiresses both of *Philip Cawston* the father, and *Philip Cawston* the son, has a good title to the copyhold in dispute; unless the inheritance of it has been effectively disposed of, either by the last codicil to the will of the former, or by the will of the latter. Two points have accordingly been made in the argument for the defendant, the first, that an estate in fee passed by the codicil to the will of *Philip Cawston* senior to *Sarah Cawston*, under

(a) 12 Ves. 426.

(c) 5 East, 527.

(b) 5 East, 522.

whom the defendants claim ; the second, which arises only if the first is not sustainable, that she took the same estate under the will of her son, and that it has passed to the defendants, or some of them.

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The codicil is as follows : " I likewise give &c. to *Sarah*, First point. my dearly beloved wife, all my copyhold in the hamlet of Ham, in the parish of Kingston, and in the county of Surrey, and likewise all monies lent out upon mortgage, bonds, or notes of hand." It was contended, that the words " all my copyhold " were equivalent " to all that I hold by copy," and, if so read, even by themselves must be taken to import, not merely the land so held, but the interest in the land, i e. the estate ; that this meaning, if doubtful in itself, was rendered clear by the juxta-position in the same sentence of the words " all monies lent out upon mortgage, &c.;" as to which it was clear that the testator's whole interest would pass absolutely to *Sarah Cawston*. Moreover, reading the codicil in question with the will itself and the prior codicil, it is said that a clear intention on the part of the testator may be collected to die intestate as to no part of his property, and further, that in the will itself, where there was an intention, both as to realty and personalty, to limit the interest of the wife, first given her, to a life estate, the testator, an illiterate person, making his own will, has evinced his own understanding of the manner in which such an intention might properly be carried into effect, by adding express words of restraint ; and that a contrary intention to give the whole interest must be inferred from the absence of any such words in the codicil in question.

The argument therefore for the defendant rests upon the import of the express words, and upon the evidence of intention to be collected from the face of the will. We are of opinion, that the words themselves, even read as we are desired to read them, and conjoined with the other bequest in the same sentence, are not sufficient to carry the fee—the property appears to us to be described only by its tenure and local situation, and that these words of de-

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scription do not include the quantity of interest in the testator; see *Right v. Sidebotham* (a). In *Doe v. Child* (b) and *Doe v. Wright* (c), where the same devise received a construction by the Courts of Common Pleas and King's Bench, the words "*all my lands, freehold, copyhold and leasehold, in the county of Essex,*" were held to pass only an estate for life in the freehold and copyhold; and in *Doe d. Norris v. Tucker* (d), a case very much resembling, but somewhat stronger than the present, a devise to sons "*share and share alike, equally to be parted between them,*" (after the death of the testator's wife) of the "*above bequeathed lands, goods and chattels,*" was held to give them only an estate for life, though the "*above bequeathed lands*" were first specifically bequeathed for life as "*my freehold estate called Pouncetts.*" The argument therefore is reduced to the evidence of intention, and certainly no one can read the will and codicils attentively, without forming at least a strong opinion that the testator intended to give to his wife the whole and absolute interest in the copyhold in question; but cases too clear and numerous, and standing on too strong a principle to be overruled by us, have decided, that where the words used by a testator in any devise can be satisfied by understanding them in their ordinary meaning, (and if the words be technical, the technical is their ordinary meaning,) and where the whole of the will does not make it a *necessary* inference that they were used in any other, the Court cannot give them any other. Our duty is to ascertain the intention of the testator by what he has written; and in so doing, for the sake of uniformity of decision, we must take him to have used his language in its ordinary meaning, if it bears any, and unless by so doing we necessarily contradict an over-ruling intention unequivocally expressed in the context. Tried by this rule, we think it clear that a life-estate only in the copyhold in question passed by the codicil, and we therefore

(a) 1 Dougl. 759.

(b) 1 N. R. 335.

(c) 7 T. R. 64.

(d) 3 B. & Ad. 473.

proceed to the second and more important point in the argument for the defendant.

This second point is, that *Sarah Cawston* took an estate in fee in the copyhold, under the will of *Philip Cawston* her son, which, it was not disputed, contained words sufficiently large for the purpose. This assumes that the reversion descended on him, and the facts stand thus:—*Sarah* was admitted “to hold according to the will of her husband;” the heir at law was never separately admitted, nor did he ever surrender to the use of his will. In 1811, and before the admission of *Sarah*, he made his will, and devised the reversion to her in fee, and died in 1819. She was not admitted under that will, nor did she administer to it, but she devised over to the defendants (*a*), by a will made in 1824, and died in 1825. Two of the defendants (*a*) are her customary coheirs, and all have been admitted.

As the will of *Ph. Cawston*, junior, contains an express devise of copyholds, and he died after the passing of the 55 Geo. 3, c. 192, it seems clear, upon the words of that statute, and the authority of *Doe v. Bird* (*b*), that the mere want of a surrender by him would be cured: but it was contended, in the first place, that his devise without surrender was inoperative for want of his previous admission. Now, unless there be a distinction in principle as to this point, between the devise of an estate which has descended in possession on the heir at law, and that of a reversion so descending, the case of *Right v. Banks* (*c*) is a direct and considered authority that admittance is not necessary. It is difficult to see how there can be any distinction between the two supposed cases. Upon the death of the father, in the present case, and before the admittance of the widow, the whole legal estate descended in possession on *Philip*, the heir at law; (*Roe v. Hicks* (*d*).) At that time he might have

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Second point.

(a) i. e. the devisees under whom the defendant claims. Ad. 695.

(c) 3 B. & Ad. 664.

(b) 2 N. & M. 679; 5 B. &

(d) 2 Wils. 13, 16.

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made a valid surrender before admittance, and his will after such surrender, and without any admittance, would have passed the estate. The *extent* to which the will would have operated *beneficially*, might have been subject in equity to the equitable rights of the devisee for life under the prior will ; but at law the legal estate must have prevailed.

Thus it would have stood if the devisee for life never had been admitted ; and this case would then have been precisely the same as that of *Right v. Banks* (a). But how can her admittance, her interest being only as tenant for life, prejudice the heir's legal estate, or the operation of his will, beyond the extent of her interest ? Her admittance would indeed turn his estate into a reversion ; but as reversioner he would equally be in the seisin as before—he might equally surrender that interest ; (*Colchin v. Colchin* (b)) ; indeed, before the passing of the statute, he *must* equally have surrendered it in order to make an effectual devise : after a surrender, the interest would have been equally devisable—and if so, the statute operates and makes it devisable without such surrender. Accordingly in the case of *King v. Turner* (c), it will be seen that the testator, whose devise without admittance was held to be inoperative, was an heir-at-law on whom a copyhold had descended in reversion, subject to the free bench of the widow, *durante viduitate*.

Third point.

Thus we come to a conclusion, that the want of an admittance by the heir-at-law, will not prevent the operation of his will, on the ground, 1st, that it could not have that effect, if the devisee for life never had been admitted ; and 2ndly, that her admission subsequently to the devise cannot prejudice its operation upon the reversion. It is perhaps therefore unnecessary to consider a further answer, which was given at the bar to this objection, that *Philip* the son was in fact admitted by virtue of the admission of *Sarah* ; but it may be as well to dispose of that point also. The authorities are numerous and clear to shew that the

(a) 3 B. & Ad. 664.  
(b) Cro. Eliz. 662.

(c) 2 Sim. 345 ; 1 Mylne & Keen, 456.

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admission of the particular tenant, is the admission of the remainder-man also; and the principle on which that has been laid down, applies equally to the reversioner; namely, that the particular estate and the remainder make but one estate. And as to a distinction, which may exist in respect to the lord's fine between the two cases, that will not be material upon the present point, which regards only the vesting of the estate for the purpose of transmission. Nothing is found in the present case as to any special custom with regard to the lord's fine, which affects the question now before us; in the absence of any such custom, the payment of the fine is collateral to the vesting of the estate, and our decision of this case, as between these parties, will not in any way prejudice the lord's right. Some observations were made upon the form of *Sarah Cawston's* admission; but we think that immaterial: the form of admission, whatever it may be, enures according to the title. And we accede to the argument, that the admittance, when once made, had relation back to the period when the will came into operation, *i. e.* the death of the surrenderor. *Sarah Cawston* became full tenant by her admission from that moment; and whatever effect her admittance had on the reversion in her son, it equally had from the same point of time. The general doctrine of relation in the case of admittance is familiar and clear, and we see no ground for any distinction. Assuming therefore that admittance was necessary to give effect to the will of *Philip Cawston* the son, we are of opinion that he was *de facto* admitted.

There remains however one difficulty to be considered in the title of the defendant—*Sarah Cawston* was never admitted under the will of her son, and as a general rule nothing is clearer than that the *devisees* of an unadmitted devisee have no legal title, without a surrender from the heir-at-law of the testator; *Smith v. Triggs (a)*, *Wainright v. Elwell (b)*. Two modes are suggested at the bar by which

(a) 1 Strange, 487.

(b) 1 Madd. 627.



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this difficulty may be met; the first, that a tenant for life once admitted as such, to whom the reversion comes by devise, needs no second admission in respect of such reversion; the second, that her heirs having been admitted, that admittance will relate back to the surrender, or that statutable equivalent to a surrender made to the use of the will, under which their ancestor would have taken. The statement in the case must be taken to import, and from a transcript of the admissions which has been sent us it appears, that the devisees have each been admitted to an undivided third of the copyholds in question; if so, there is a third of the land now in dispute to which the two who are also customary heirs have not been admitted in any capacity, and therefore this second answer, if satisfactory in itself, will still leave the defendants undefended as to that one-third. It is proper therefore first to consider the answer which applies to the whole.

Upon this point it was argued, that the devise of the reversion to the tenant for life operated by way of enlargement of her estate; that the life estate was not merged, although it was admitted that it did not remain distinct from it; that the life estate therefore still remaining *in esse* in a certain sense, though united with the fee, no new admittance in respect of the fee was even possible, and that the former admittance enured not merely according to the estate, which the tenant for life at that time had, but also according to her estate in its altered condition. No authorities were cited in this part of the argument, and, after some search, our decision must rest on analogy and principle, rather than any decision in point.

It seems to us difficult to say that the life estate in this instance did not merge. A devisee takes by purchase; and although it be true that without any act done by him, such as entry, or express declaration, to shew his assent, the estate by presumption of law vests in him immediately on the death of the deviser; *Co. Litt.* 111 a. Yet that this is

founded on a presumption of fact that he assents to what is for his benefit, is clear from this, that he may, by certain express acts of dissent, waive the devise before entry; *Townson v. Tickell* (a), *Doe v. Smyth* (b).

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If then the devisee, tenant for life, has taken the reversion by purchase, is this any thing more than an ordinary case of merger? The two estates have come together in the same person, but they cannot co-exist in the same person without involving many legal inconsistencies; the lesser, therefore, by the rule of law, is drowned or annihilated in the greater.

Mr. *Hodgson*, who argued this case most ingeniously for the defendants, seemed to be aware of the consequences of our holding the life estate to be merged; they are indeed obvious. By the admission *de facto* of *Sarah Cawston* under her husband's will, we have held that she was admitted to her life estate, and her son inclusively, if necessary, to the reversion. This latter effect was of course spent upon the death of the son, and if the reversion cannot vest in her without immediately annihilating her life estate, the first effect of the admission will upon that event be equally spent, and a new admission will consequently be necessary. This case therefore falls within the general rule, and the title of *Sarah Cawston's* devisees, as such, cannot prevail; *Vernon v. Vernon* (c).

It is therefore necessary to consider the second answer, which rests the defendant's case upon the title of the admitted heirs; and we are of opinion, that to the extent of the two-thirds, to which they have been respectively admitted, that ought to prevail.

The devisee under a will of copyhold, before the statute, was in truth no other than a surrenderee under the surrender to the uses of the will: in this respect the statute, dispensing with the necessity for an actual surrender, has made no differ-

(a) 3 B. & Ald. 31.

& C. 112.

(b) 9 D. & R. 136; S. C. 6 B.

(c) 7 East, 8.

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ence; as such surrenderee, he is entitled to admittance, and if he dies before admittance, his customary heir is entitled in the same manner; and when admitted, the legal estate is in him by relation from the surrender; 4 Co. 29 b; *Bac. Abr. Copyhold*, (G. 8); and *Vaughan v. Atkins*(a). In this respect the case of the heir of such devisee or surrenderee differs from that of the devisee of either; the latter claiming only under the will of the unadmitted devisee or surrenderee, does not by admittance connect himself with the first deviser or surrenderor, in whose heir the legal estate remains; there would appear, as observed by *Lawrence J.* in the case of *Doe v. Vernon*(b), a chasm in the court rolls, between the surrender to the use of one person's will and an admittance under that of another. But the heir of the unadmitted surrenderee is in by descent, and represents his ancestor.

If this reasoning be correct, we think it clear, further, that the effect of this admission of the customary coheirs of *Sarah Causton*, is not altered by the circumstance that they professed to be admitted as devisees. We have already had occasion to state that the admittance, where the act of the lord is ministerial only, always enures according to the title, this is very clearly laid down in *Westwick v. Wyer*(c), and several cases are there stated fully establishing the position. We are therefore of opinion that the coheirs of *S. C.* having been admitted to two undivided thirds of the tenement, the heirs of *P. C.*, the son, are now entitled only to the remaining third, and they being three in number, the lessors of the plaintiff are entitled to recover one-third only of the land which has been the subject-matter in dispute in this action.

Verdict for the plaintiff.

(a) 5 Burr. 2764.

(b) 7 East, 24.

(c) 4 Co. 28 b.

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Friday,  
June 9th.

## DE RÜTZEN and Wife v. LLOYD.

**CASE** for disturbance of the plaintiffs' market. The cause was tried before *Gurney B.*, at the spring assizes for Pembrokeshire, in 1834. The plaintiffs obtained a verdict, subject to a motion to enter a nonsuit. A rule nisi for a nonsuit was obtained, which was argued in Trinity term, 1836. The Court, on argument, discharged the rule for entering a nonsuit, but ordered a new trial to be had. The rule granted contained no mention of costs. The attorney for the plaintiffs drew up the rule, and served it upon the defendant's attorney, who, a few days afterwards, wrote as follows :

"*Lloyd, Esq. ats. De Rützen & ux.*

"Sirs,—My client will not avail himself of the privilege granted by the Court of a new trial in this cause, the points relating to the nonsuit having been decided against him."

In Michaelmas term, 1836, *J. Evans* obtained a rule nisi that the rule for a new trial should be discharged, and the postea be delivered to the plaintiffs, and that they should be at liberty to sign judgment and tax their costs thereon. Against this rule,

*E. V. Williams* now shewed cause. By abandoning the privilege of a new trial in this case, the defendant does no more than this : he declines further litigation, and offers to put the plaintiffs in the same situation as they would have been in if they had succeeded on the second trial. In that case, no mention of costs being made in the rule, the plaintiffs would have been liable to their own costs on the first trial, by rule 64 Hil. T. 2 Will. 4; and they cannot be placed in a more favourable situation by our refusing to defend the second. If, instead of declining to go to trial, the defendant had withdrawn his plea, and suffered judgment to go by default, the plaintiffs could not have obtained

Verdict for plaintiffs. Defendant had obtained a rule for a new trial : the rule contained no mention of costs. The plaintiffs' attorney drew up the rule, and served it upon the defendant; upon which the defendant's attorney wrote to say that the defendant declined availing himself of the privilege of the new trial. The Court, on the application of the plaintiffs, discharged the rule for a new trial, and held the plaintiff entitled to sign judgment, and to the costs of the first trial.

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the costs of the first trial. *Peacock v. Harris* (a). The plaintiffs cannot now move to set aside a deliberate act of the Court, merely on the ground of such a proposal as this made by the defendant's attorney. It might have been made use of as an admission against the defendant, if the plaintiffs had declined the offer and proceeded to the second trial; but it cannot be made the ground of a motion like the present.

*Creswell*, in support of the rule. The rule of Hil. T. 2 Will. 4, cited on the other side, does not affect this case. It is to the effect that if a rule for a new trial is granted without any mention of costs, the costs of the first trial cannot be allowed to the party who succeeds on the second. But here the defendant abandons his right to a new trial, and cannot therefore protect himself by this rule from his liability to the costs of the original action. In this instance, therefore, the usual practice of the Court applies; and a party waiving or confessing the second action is liable, as heretofore, for the costs of the first, although no express provision be contained in the rule for the new trial: *Booth v. Atherton* (b), *Hankey v. Smith* (c), *Smith v. Haile* (d), *Bird v. Appleton* (e), *Robertson v. Liddell* (f), *Jackson v. Hallam* (g), *Elvin v. Drummond* (h). In *Peacock v. Harris* (a), notice of the second trial was given, and the plea afterwards withdrawn; which was thought to bring it within the new rule, and distinguishes that case from the present.

LORD DENMAN C. J.—My first impression was, that the defendant, by abandoning his rule for a new trial, has placed himself in the same situation as if no rule had been obtained. It seems, undoubtedly, hard that a defendant

(a) 1 N. & P. 240.

(b) 6 T. R. 144.

(c) 3 T. R. 507.

(d) 6 T. R. 71.

(e) 1 East, 111.

(f) 10 East, 416.

(g) 2 B. & A. 317.

(h) 4 Bing. 415.

should be placed in a worse situation by giving the plaintiffs notice that he does not mean to put him to any more expense. Nor is it easy to distinguish this case from *Peacock v. Harris* (a). But I am of opinion that the facts of the plaintiffs having drawn up the rule, and of the defendant's abandoning it, place the case on the same footing as if no rule at all had been granted. The proceeding of the defendant seems to amount to an admission that, although he succeeded, he did so on ground which he now relinquishes as untenable.

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LITLEDALE J.—It is evident that the defendant felt he could not make an effectual defence on the new trial, and therefore gave notice to the plaintiffs that he abandoned his privilege. If the plaintiffs had succeeded on the second trial, they would, no doubt, not have been entitled to the costs of the first. But can they be deprived of them by the defendant's abandonment? *Peacock v. Harris* (a) differed from the present case. There notice of the second trial was given; parties were prepared for it; and judgment went by default. There the record was altered, and circumstances assumed a new position. That is not the case here, where the defence is withdrawn before any steps at all are taken. The rule therefore must, in my opinion, be made absolute.

PATTESON J.—The defendant obtained the rule. It was for him to draw it up. If neither he nor the plaintiffs drew it up, there would be no rule, and the plaintiffs would be entitled to judgment and to the costs of the first action. But the plaintiffs drew it up, and served it on the defendant; the defendant refused it. The plaintiffs are therefore obliged to come into Court to get their own rule discharged; and they ought to be placed in the same situation as if no rule had been drawn up. In making this rule absolute, therefore, we shall not be acting inconsistently with

(a) 1 N. & P. 240.

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the decision in *Peacock v. Harris* (a); for in that case the defendant drew up his own rule, and served it: it was acted upon; notice of trial was given; the defendant withdrew his plea, and suffered judgment to go by default. The liberty to withdraw his plea was granted as a favour: he did not mean to give the plaintiff any additional advantage beyond what he would have obtained if he had got the verdict on a second trial. The case of *Robertson v. Liddle* (b) depends upon a different principle. There the parties agreed to abandon the new trial, and stated the facts in a special case, as if they had been reserved on the first trial. But the decision in *Jackson v. Hallam* (c), where the defendant confessed the action by giving the plaintiff a cognovit, and was held liable to pay the costs of the first action, does not appear so easily reconcilable with that in *Peacock v. Harris* (a).

WILLIAMS J.—The circumstances here are very peculiar. The difficulty which I felt at first was, that if the defendant had persisted, and gone down to trial, the plaintiffs could not have obtained the costs of the former trial. But on further consideration, I think that the defendant, by the notice which he has given, has placed himself in the same situation as if no rule had been obtained by him at all. The plaintiffs would then have had judgment and costs in the ordinary course.

Rule absolute. But the Court refused to allow the plaintiffs the costs either of this rule or of that which had been made absolute for the new trial.

(a) 1 N. & P. 240.

(c) 2 B. & A. 317.

(b) 10 East, 416.



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HEAD v. BALDREY (a).

ASSUMPSIT. The declaration stated, that whereas the defendant heretofore, to wit, on &c., was indebted to the plaintiff in the sum of 703*l.* 4*s.* 6*d.*, for the price and value of goods, wares and merchandize, before that time sold and delivered by the plaintiff to the defendant, at his special instance and request; and which said sum of money was then due and payable from the defendant to the plaintiff: and thereupon, heretofore, to wit, in consideration of the premises, and that the plaintiff, at the special instance and request of the defendant, would sell and deliver to him the defendant divers, to wit, ten sheets of wool, at a certain rate or price then agreed upon between the plaintiff and the defendant, to wit, at the rate of &c.; and also in consideration that the plaintiff, at the like special instance and request of the defendant, would give time to the defendant for the payment of the said sum of money so due and owing from the defendant to the plaintiff, as hereinbefore mentioned, until and upon the 25th October, 1834, he, the defendant, undertook and then faithfully promised the plaintiff to pay him for the said goods, and the said sum of money so due and owing from the defendant to the plaintiff as aforesaid, by accepting a bill of exchange, to be drawn by the plaintiff upon the defendant, and payable in three months from the 22nd July, in the year aforesaid, to the order of him, the

The declaration stated that the defendant was indebted to the plaintiff in 703*l.*, for goods previously sold, in consideration whereof and of the plaintiff's selling him some sheets of wool at a certain rate, and in consideration that the plaintiff would give time to the defendant for the payment of the said sum of money, the defendant promised to pay the said sum and the value of the wool to be delivered, by accepting a bill of exchange for the whole amount.

There was an averment of the delivery of the wool, and that its value was 531*l.* 11*s.*

(a) This case was decided in postponed in order that it may precede *Mechelen v. Wallace*.

2*d.*, that the plaintiff did give time to the defendant for payment, and that the plaintiff tendered a bill for acceptance, but the defendant refused to pay, by accepting the bill or otherwise, and that the whole aggregate sum remained unpaid. The first plea was, that the goods were above the value of 10*l.*; and that there was no note in writing or acceptance of any part of the wool so agreed to be sold and delivered. The second plea was, that the wool was warranted of a superior quality; that it was of an inferior quality, and thereby was of no use to the defendant, who returned it. It was held, first, that each plea was a complete answer to the action, because there was a failure of part of the consideration for the promise: Secondly, that the Court could not give judgment for the plaintiff, on the ground that, looking at the whole record, a good consideration and a good cause of action, to the amount of 703*l.*, the price of the wool previously sold, clearly existed, because, in an action of assumpsit, the defendant can only be made chargeable with the breach of the promise as laid in the declaration.

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plaintiff, whenever he, the defendant, should be thereunto afterwards requested. Averment, that the plaintiff did afterwards sell and deliver to the defendant divers, to wit, twenty-one packs and fifty-nine pounds of wool, upon the terms aforesaid, and did consent and offer to the defendant to give time for the payment of the said sum of money, so due and owing from the defendant to the plaintiff, as thereinbefore mentioned, and did also draw a certain bill of exchange upon the defendant, payable in three months from the 22nd of July, in the year aforesaid, to the order of the plaintiff, for the sum of 1237*l.* 12*s.* 5*d.*, being the aggregate amount of the said sum of money so due and owing from the defendant to the plaintiff as aforesaid, and of the said wool so sold and delivered by the plaintiff to the defendant. The declaration then averred, that the plaintiff requested the defendant to pay the said sum of 1237*l.* 12*s.* 5*d.*, by accepting the said bill of exchange, yet that the defendant would not pay the plaintiff the said sum of 1237*l.* 12*s.* 5*d.*, by accepting such bill of exchange as aforesaid. There was a second count for goods sold and delivered, interest, and on an account stated.

Pleas to the first count. First, That the agreement or contract for the sale or delivery of the said sheets of wool therein mentioned, was a contract for the sale of goods for a price far exceeding the sum of 10*l.*, to wit, &c.; and that he, the defendant, did not accept any part of the said last-mentioned goods so sold, and actually receive the same, nor did he give any thing in earnest to bind the bargain, or in part payment, nor was, nor is there any note or memorandum in writing of the said bargain, made and signed by the defendant or his agent thereunto, by him lawfully authorized. Second, That at the time of the making of the agreement in the first count mentioned, to wit, on &c., in consideration that the defendant, at the request of the plaintiff, had promised the plaintiff to buy of him the said ten sheets of wool in the first count mentioned, at and for the price therein also mentioned, he, the plaintiff, promised the defendant that the

said ten sheets of wool, in the said first count mentioned, were of the best Suffolk growth and park fed; and thereupon the defendant, confiding &c., did afterwards, to wit, &c., buy of the plaintiff the said ten sheets of wool as and for such wool so agreed to be bought as aforesaid, and upon the terms aforesaid, and which the plaintiff then sold to the defendant as and for such wool as aforesaid, nevertheless, though the plaintiff delivered the said ten sheets of wool to the defendant, yet the said ten sheets of wool, and each and every of them, were not of the best Suffolk growth and park fed, whereby the said ten sheets of wool, and each and every of them, became and were of no use or value to the defendant. Averment, that within two days next after the delivery of the wool, and as soon as he, the defendant, discovered that the same was not of the best Suffolk growth and park fed, he, the defendant, returned the said ten sheets of wool to the plaintiff, for the cause aforesaid.

There was a general demurrer to the two pleas to the first count.

The plaintiff stated to the Court the following matter of law intended to be argued. That although the defendant, in his first and second pleas respectively, professed to answer the whole cause of action in the first count of the declaration mentioned, yet he, the defendant, answered a part only of the cause of action in that count mentioned.

The defendant stated the following matter of law intended to be argued. That the promise mentioned in the first count is an entire promise, and not capable of being severed; that such promise, so far as the same relates to the sale of the sheets of wool in the first count mentioned, is invalid by the 17th sect. of the Statute of Frauds; that there had been a failure of part of the consideration for the said promise.

F. Kelly, in support of the demurrer (*a*). Both the pleas

(*a*) On Tuesday, the 24th of January, 1837, before Lord Den-
man C.J., *Littledale J.* and *Wil-*
liams J.

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are bad. With respect to the second, there is little difficulty. That plea relates only to the wool, and it states a breach of the warranty with respect to the quality of the wool. The breach of the warranty is no answer to the present action, although it might be the subject of a cross-action. The only case in which a breach of warranty can be set up as a defence is, where it is expressly stipulated that the article shall be of a certain quality, and the compliance with the warranty is therefore a condition precedent to the right of bringing the action for the price. Here the warranty was no term of the original contract. Suppose a man sells two horses for 200*l.*, and warrants them both as sound, and one only is unsound,—if he brings an action for the 200*l.*, it would be no answer for the defendant to plead that one of the horses is unsound. The remedy of the defendant in that case, for the loss he has sustained, would be by a cross-action.

Then, with respect to the first plea, the question for the consideration of the Court is, where a contract is not for the sale of goods only, but partly for the sale of goods above the value of 10*l.* and partly for the payment of an antecedent debt, whether such a contract is within the Statute of Frauds. The consideration for the promise is twofold; the sale of the wool, and the giving time to the defendant for the payment of money due to the plaintiff. Such a contract is not rendered void by the Statute of Frauds. It has been held, that if a man contract to build a carriage for a certain price, the contract is not within the Statute of Frauds (*a*). Assuming, however, that there has been a failure of part of the consideration for the promise, and consequently that an action cannot be maintained for the breach of that promise, yet if it appear upon the whole record that the plaintiff has a good cause of action, the Court will give judgment for him: *Charnley v. Winstanley* (*b*), *Le Brett v. Papillon* (*c*). Here it appears, on the

(*a*) See *Groves v. Buck*, 3 M.
& S. 178; *Hoadly v. M'Laine*, 10
Bingh. 482.

(*b*) 5 East, 266.
(*c*) 4 East, 502.

face of the record, that the plaintiff has a good cause of action. It is admitted by the pleas that the defendant is indebted to the plaintiff for goods sold and delivered. There is both a promise to pay for them by accepting a bill at three months, and a breach of that promise. It has been held in many cases, that where a bill has been given for goods sold and delivered, and the time for which the bill was given has elapsed, that an action can be maintained for the original consideration.

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W. H. Watson, contra. As to the first plea, this is a case clearly within the 17th sect. of the Statute of Frauds. It has been held, in numerous cases, that if there be a failure of part of the consideration for a promise, that the promise is void, and that it cannot be considered void as to one part, and good as to the other: *Lord Lexington v. Clark (a)*, *Chater v. Becket (b)*, *Thomas v. Williams (c)*. *Wood v. Benson (d)* is distinguishable from the present case, because there the declaration did not state an entire promise: and it was on that ground that *Bayley B.* distinguished it from the cases which have been cited. The contract here is entire and indivisible. Before the new rules, if the party on this declaration had gone to trial on a plea of non assumpsit, he must have been nonsuited on a failure to prove the whole consideration laid; and this plea raises the same objection, which must be equally fatal now it is disclosed by special pleading.

Then, as to the second plea, it is an answer to the action on two grounds. First, This plea states that the contract had a warranty annexed to it. The warranty was part of the consideration for the defendant's promise; and as the whole consideration must be stated, the plea is an answer, because the plaintiff has not alleged the warranty as part of the consideration. *Cross v. Bartlett (e)* is in point. *Charnley v. Winstanley (f)* has no application: the Court held

(a) 2 Vent. 223.

(d) 2 C. & J. 94.

(b) 7 T. R. 201.

(e) 3 M. & P. 537.

(c) 10 B. & C. 664.

(f) 5 East, 266.

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there, after verdict, that they would collect a breach of the contract, although informally alleged. Here the objection raised by the plea is, that the contract itself is indivisible; and if there is a failure of part of the consideration alleged, the plaintiff cannot recover. Secondly, If a party sell goods in bulk with a warranty, and the goods do not correspond with the warranty, and they are returned as soon as that is discovered, no action can be maintained for their price: *Street v. Blay (a)*. The second plea states the contract, and the breach of it, and that, as soon as the breach of warranty was discovered, the defendant returned the goods to the plaintiff.

Kelly, in reply. In none of the cases cited with respect to the first plea was there any right of action at the time the contract declared upon was entered into. In all of them the contracts were executory. Here, at the time the promise in the declaration was made, there was a good cause of action. It never has been decided that, where the Court can sever one contract from the other, they will not do so.

Cur. adv. vult.

Lord DENMAN C. J., in Hilary term, delivered the judgment of the Court. After stating the pleadings, his lordship continued thus:

The point stated and argued was, that the special pleas afforded no answer to the whole declaration, but only to that part which proceeded on the second sale. We are clearly of opinion that each of these is in itself good, and affords a complete answer to the plaintiff's cause of action, by the failure of a part of the consideration for the promise laid. *Chater v. Becket (b)*, *Thomas v. Williams (c)*.

The demurrer is founded on the principle, that however irregular the mode of pleading may be, the Court will look to the whole record, and give judgment according to the

(a) 2 B. & Ad. 456.

(c) 10 B. & C. 664.

(b) 7 T. R. 201.

truth as there disclosed; *Le Bret v. Papillon* (a), *Charnley v. Winstanley* (b); and applying that principle to this case, the plaintiff contends that a good cause of action is sufficiently stated in his declaration, and not affected by the plea. For though the promise to pay by accepting a bill cannot be enforced, because the consideration for it is partially bad in law, a good consideration and a good cause of action, to the amount of 703*l.*, the price of the wool previously sold, clearly existed when the promise was made, the declaration shewing that the old debt still remained unpaid, for the defendant would not accept the bill for the entire sum, nor pay for the same or any part of it.

But in this action of assumpsit, we apprehend that the defendant can only be made chargeable for a breach of the promise laid; and that promise is not to pay for these or any other goods sold, but to fulfil a specific arrangement between the parties, that is, to pay by accepting a bill in respect of this liability, and a new one, then in contemplation. On this point we are of opinion, that the two cases last mentioned cannot assist the plaintiff, as they go no farther than to call upon the Court to give such judgment as the law requires upon the whole record, with respect to the cause of action there stated. The Court cannot pick out of various parts of the record a different cause of action from that for which the plaintiff proceeds; and indeed, if it could, the present record would be imperfect, being in assumpsit, but containing no promise to pay for the goods, which are stated to have been delivered, and to be still unpaid for. No decision has hitherto approached such a conclusion; nor can we permit a plaintiff to recover in a form of action, the very foundation of which is wanting. Judgment must therefore be for the defendant on this demurrer.

Judgment for the defendant.

(a) 4 East, 502.

(b) 5 East, 266.

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*Friday,
May 26th.*

MECHELEN v. WALLACE.

A declaration in an action of assumpsit stated that the plaintiff was desirous of taking a furnished house as a school; that the defendant was possessed of a house in part furnished, and all other furniture necessary for the completely furnishing the same, and thereupon in consideration that the plaintiff, at the request of the defendant, would take possession of the said house so partly furnished, and would, if the furniture, necessary for the completely furnishing the said house, for the purpose aforesaid,

should be sent into the said house by the defendant, within a reasonable time, become the tenant of the defendant of the said house, with all the furniture aforesaid, at the rent aforesaid, and pay the rent quarterly, commencing, &c. The defendant promised the plaintiff that he the defendant would, within a reasonable time after the plaintiff should have so taken possession of the same house and premises, send into the said house and premises all the furniture necessary for the completing of the furnishing of the said house with furniture of good quality. There was then an averment that the defendant took possession of the house, and the branches of the promise stated were, that the articles of furniture sent into the said house were not of good quality, and that all the furniture necessary for the completing of the furnishing of the said house, was not sent in. Plea: that there was no note or memorandum in writing of the promise stated in the declaration. It was held, on demurrer, that the promise stated in the declaration related to land, and that, as there was no note or memorandum in writing, no action could be maintained upon it.

ASSUMPSIT. The declaration stated, for that whereas before and at the time of the making the promise of the defendant hereinafter mentioned, the plaintiff was desirous and intended to hire and take, as tenant, a furnished house and premises, suited for the convenient accommodation and reception of the plaintiff and his family, and of divers, to wit, twelve scholars and boarders, and in order that a school, consisting of &c., might be conducted and carried on in and upon such furnished house and premises, by the wife of the plaintiff, of which desire and intention the defendant, before and at the time of making the said promise, had notice. And whereas also the defendant, at the said time, was possessed of a certain house and premises, in part furnished, and was desirous that the plaintiff should take and hire, at a certain rent, to wit, &c., the said house and premises, with the said furniture, and all other furniture necessary for the completely furnishing the same, for the purpose aforesaid, and thereupon, to wit, &c., in consideration that the plaintiff, at the request of the defendant, would take possession of the same house and premises, so partly furnished as aforesaid, and would, if the furniture necessary for the completely furnishing the said house and premises, for the purpose aforesaid, should be sent into the said house and premises by the defendant, within a reasonable

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time, become the tenant to the defendant of the said house and premises, with all the furniture aforesaid, at the rent aforesaid, and pay the same rent quarterly, commencing from a certain day then in that behalf agreed upon, to wit, &c., the defendant promised the plaintiff that the defendant would, within a reasonable time after the plaintiff should have so taken possession of the same house and premises, send into the said house and premises all the furniture necessary for the completing of the furnishing of the said house with furniture of good quality, and suited for the purpose aforesaid, to wit, &c., and thereupon the plaintiff, relying on the promise of the defendant, did, to wit, at the request of the defendant, take possession of the said house and premises, so partly furnished as aforesaid, and remained in possession of the said house and premises, until the expiration of such reasonable time as aforesaid, to wit, until &c., and although the plaintiff would have become tenant as aforesaid, and paid rent as aforesaid, if the defendant would have sent in such furniture as aforesaid, within such reasonable time as aforesaid, and although such reasonable time elapsed long before the commencement of this suit, and although the plaintiff, during such reasonable time, to wit, on &c., requested the defendant to send in such furniture as aforesaid, and although the defendant, during such reasonable time, to wit, &c., sent into the house and premises divers, to wit, twenty articles of furniture, yet the defendant has disregarded her said promise in this, to wit, that the said articles of furniture so sent in as last aforesaid were not furniture of a good quality, nor suited for the purpose aforesaid, but, on the contrary thereof, were furniture of a very bad quality, worn out and unfit for the purpose aforesaid. And the said defendant has further disregarded her promise in this, to wit, that she did not, nor would, within such reasonable time as aforesaid, send into the said house and premises all the furniture necessary for the completing of the furnishing of the said house and premises as aforesaid, but, on the con-

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trary thereof, wholly neglected and refused so to do, and a great part, to wit, three-fourths of the furniture necessary for the completing the furnishing of the said house and premises as aforesaid, never was sent into the said house and premises, by means whereof, &c.

Plea: that the promise in the said declaration mentioned, was and is part and parcel of a contract made by and between the said plaintiff and the said defendant, concerning the said tenement, and the interest relating to the same, as in the said declaration appears. And the said defendant further says, that neither the said contract, nor any memorandum or note thereof, was or is in writing, signed by her the said defendant, or any person thereunto by her lawfully authorized.

To this plea there was a special demurrer.

J. Henderson, in support of the demurrer. The promise in the declaration is a promise to send certain furniture to a certain place, and relates exclusively to personal chattels. The defendant's plea in effect alleges, that it appears on the face of the declaration that the promise related to lands. It is admitted that if a party makes an *entire* promise to do several acts, some of which are within the Statute of Frauds, and others not, the contract cannot be enforced unless it be in writing. But in this case the promise, as stated in the count and admitted in the plea, is to do that which is not within the statute. In *The Earl of Falmouth v. Thomas* (a), the contract was entire, and it is to be inferred from several observations which fell from the Court in that case, that if the defendant's contract to pay for the work, &c. had been in its nature severable from his contract to take the farm, the judgment of the Court might have been different. In *Chater v. Beckett* (b), and *Thomas v. Williams* (c), the promises were stated as entire. These cases, and others of the same class, may, as was suggested by the Court in *Wood v. Benson* (d), be

(a) 1 C. & M. 89.

(c) 10 B. & C. 664.

(b) 7 T. R. 201.

(d) 2 Tyr. 93; S. C. 2 C. & J. 94.

considered as founded rather on the ground of variance than on any inflexible rule, that because a contract is in part affected by the statute, it is therefore incapable of conferring a right of action as to any part. The observations of Mr. Baron *Bayley*, in *Wood v. Benson* (a), fully illustrate this distinction. His lordship observed, that "if a declaration is so framed as to apply to and sustain the proof of the valid part of a contract, partly void, it by no means follows, that because an action could not be sustained for the whole, it cannot be sustained for that part. The doctrine in *Chater v. Beckett* (b) may go beyond the mere principle of variance, but in that case, as well as in *Thomas v. Williams* (c), the declaration stated as well the void as the binding parts of the entire promise; so that the promise alleged being entire, there was a failure of proof in that part of each case which required a writing within the Statute of Frauds. The same observation applies to the other cases cited, to shew that the contract if void in part was void *in toto*. Those cases then may be sustained on the ground of failure to prove the contract alleged, but do not establish decisively, that if the good part can be separated from the residue, the good part may not be enforced by action." *Mayfield v. Wadsley* (d) likewise affords an illustration of the same principle. But in the present case the plaintiff is not driven to any severance of branches of the defendant's promise. That promise, as stated and admitted, is simply to send furniture into a house. If such a promise necessarily imports any thing affecting an interest in the house; then a contract to send furniture into a ship would infer a contract relating to an interest in a ship. As to the *consideration* for the promise, it is sufficient. The defendant has not alleged that the contract was not signed by the plaintiff, and it is needless and unusual in a declaration to allege in terms a compliance with the requisition of the Statute of Frauds

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(a) 2 Tyrw. 93; S. C. 2 C. & J. 94.

(b) 7 T. R. 201.

(c) 10 B. & C. 664.

(d) 5 D. & R. 224; S. C. 3 B. & C. 357.

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as to writing, even where such compliance is necessary, the statute affecting not the essence but the evidence of the contract. The declaration discloses an executed consideration, and in any view the defendant cannot object to the sufficiency of the consideration, for want of writing signed by the plaintiff or his agent, as she has not raised that objection by pleading, and it is consistent with the record that the plaintiff signed the contract. Even if the contract declared on were within the statute, it was not necessary, for the purpose of this action, that the plaintiff should have signed it. *Egerton v. Matthews*(a), *Wain v. Warlters*(b), and other cases of that class, decided, that where the agreement declared on is within the 4th section of the Statute of Frauds, the consideration must be expressed in the writing. But the present action does not charge the defendant in respect of any interest in land, and as it relates only to personal chattels, does not affect such interests as were intended to be protected by that part of the 4th section which relates to lands.

Maule, (with whom was *Boyle*), contra. The question for the determination of the Court is, whether the agreement on which the action is brought is a contract concerning any interest in land. There is no doubt that the contract does relate to an interest in land, and that it is an entire contract. If the agreement had been to put furniture into the house of a third party, then it might perhaps have been contended that the contract did not relate to land. There is no case which warrants the proposition laid down for the plaintiff. The general rule is, that the whole contract is to be looked at, and that one part cannot be separated from the other. In *Mayfield v. Wadsley*(c), the question entertained by the Court was, whether there was one agreement or two agreements, and they decided that there were two. In that case there was, in the first instance, a complete agreement as to the wheat, and then

(a) 6 East, 307.

(b) 5 East, 10.

(c) 5 D. & R. 324; S. C. 3 B. & C. 357.

the agreement with respect to the dead stock took place. It has been determined in another action between these very parties, that the bargain here was one entire contract (a). If that part of the bargain which relates to the letting of the house was struck out of the agreement, what an absurd contract would remain. *Chater v. Beckett* (b) shews, that if one part of a contract is within the Statute of Frauds, the plaintiff cannot recover on the other part, although that part may not be within the statute. *Grose J.* there says, "It seems admitted that part of this promise is void by the statute, but it was one indivisible contract, and the plaintiff cannot recover on any part." The contract in this case resembles, in some respects, that in *Bird v. Higginson* (c).

(He was then stopped by the Court.)

J. Henderson in reply. *Mechelen v. Wallace* (d) is not in point. That case simply determines that the furnishing the house was a condition precedent to the commencement of the tenancy, and that the tenancy had not commenced so as to justify a distress for rent (e). The argument for the defendant assumes that the contract for the letting of the house cannot be severed from the contract respecting the furniture. The declaration does not assert that the defendant was under any legal obligation to let the house, and no obligation on her part to do that which would affect a right to land is attempted to be enforced in this action. The whole of the promise, for the breach of which this action purports to be brought, is to send in furniture.

LORD DENMAN C. J.—The bare statement of the case shews that this contract relates to an interest in land.

LITLEDALE J.—This is an executed contract, and it is for the house and furniture together.

(a) See *Mechelen v. Wallace*, 6 & E. 160, 696. N. & M. 316.

(d) 6 N. & M. 316.

(b) 7 T. R. 201.

(e) See *Regnart v. Porter*, 7

(c) 4 N. & M. 505; S. C. 2 A. Bing. 451.

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PATTESON J.—The statute enacts that no contract or sale of any interest in land shall be valid, unless there be a note in writing. The plaintiff certainly made a contract of an interest in land.

Judgment for the defendant (a).

(a) *Williams J.* was sitting in the Bail Court.

Wednesday,
May 24th,
and
Friday,
June 9th.

GUEST v. ELWES.

1. In an action on the case, against the sheriff, the declaration contained one count, for an escape. The defendant pleaded, first, not guilty; secondly, that he the sheriff did not arrest the debtor of the plaintiff. Issues on both pleas. At the trial it appeared that the sheriff had not made an arrest, but had negligently omitted to make an arrest. The judge refused to amend the record, under the 3 & 4

THIS was an action against the sheriff of Gloucestershire, for an escape, and for falsely returning that the debtor of the plaintiff was not within his bailiwick. At the trial (a) it appeared that the officer did not arrest, but that he negligently omitted to arrest the debtor when he had an opportunity. The plaintiff's counsel applied for leave to amend, which the learned judge refused, but permitted the trial to go on with proof of the negligence stated, and directed that fact, when found by the jury, to be indorsed on the record. The jury found that the sheriff had omitted to arrest the debtor, and they assessed the plaintiff's damages at 30*l*. A verdict was entered for the defendant, and the special finding was indorsed on the record. In Michaelmas term, 1834, *Talfourd Serjt.* obtained a rule nisi to set aside the verdict for the defendant, and enter judgment, according to the special finding of the jury, for the plaintiff, for 30*l*. damages, the record being amended so as to charge a negli-

(a) See the former case, 6 N. & M. 433.

Will. 4, c. 42, s. 23, but permitted the plaintiff to prove that the sheriff had negligently omitted to make an arrest. The jury found a verdict for the defendant, on both issues, and, by the direction of the judge, specially found the omission to arrest, and assessed the damages at 30*l*. The finding was indorsed on the record. The Court of King's Bench subsequently gave judgment for the plaintiff, according to the right of the case. The postea stated the verdict as to the issues, and the negligent omission of the sheriff, and that according to the very right the plaintiff ought to have judgment to recover his damages, but was silent as to costs. It was held that the plaintiff was entitled to the general costs of the cause, but that the defendant was entitled to be allowed the costs of the issues, and that each party should pay his own costs of the motion to enter up judgment according to the right and justice of the case.

2. The Court has no power to amend a record, under 3 & 4 *Will. 4, c. 42, s. 24*, where the jury has been directed to find the facts specially.

gent omission to arrest. In Easter term, 1836, that rule was made absolute, on the terms in which it was moved. In Trinity term, 1836, an application was made to the Court that the rule might be altered, by omitting the words which directed that the verdict should be set aside and the record amended. That application was made on the ground that the Court had no authority by the 3 & 4 Will. 4, c. 42. That rule was made absolute, no cause being shewn. The rule was then drawn up that judgment be entered according to the special finding of the jury for the plaintiff, with 30*l.* damages. The *postea* stated as follows: The jurors upon their oath say, as to the first issue within joined between the parties, that the defendant is not guilty, &c.; and as to the other issue within joined between the parties, the jurors aforesaid, upon their oath aforesaid, say, that the defendant did not take and arrest the said *J. H.* in manner and form as the plaintiff hath within in that behalf alleged, and thereupon the said judge, before whom the said issues came on to be tried, to wit, the said Sir *Edward Hall Alderson*, Knight, having, according to the form of the statute in that case made and provided, directed the said jurors to find the facts according to the evidence, the jurors aforesaid, upon their oath aforesaid, did further find and say, according to the form of the said statute, that the defendant had been guilty of a negligent omission to arrest the said *J. H.* within named, and they assessed the damages which the plaintiff had thereby sustained at 30*l.*, and it now appearing to the said Court here, that the variance between the mode of stating the cause of action in the declaration within mentioned, and the cause of action as it appeared upon the finding of the said jurors, is immaterial to the merits of the case, and that the mis-statement of the cause of action in the said declaration, was and is such as could not have prejudiced the defendant in the conduct of the defence to the said action, and that, according to the very right and justice of the case, the plaintiff ought to have judgment to recover his said damages, therefore, &c.

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Upon the taxation of costs, the Master allowed the plaintiff his full costs, as if he had succeeded on both the issues joined. He also allowed the plaintiff the costs of his application to this Court. In Michaelmas term, 1836, the defendant obtained a rule, calling on the plaintiff to shew cause why the taxation of costs for the plaintiff should not be set aside, and why the Master should not tax the defendant his costs of the cause, or why the Master should not review his taxation of the plaintiff's costs, and tax the defendant his costs of all the issues, and why the costs which the Master might allow the defendant should not be deducted from the plaintiff's damages, or damages and costs.


R. V. Richards shewed cause (a). The plaintiff is entitled to his full costs, as if he had succeeded on both the issues, because the question in dispute between the parties was really tried, and the plaintiff succeeded upon it. This Court has held that the variance was immaterial, and could not prejudice the defendant in the conduct of his cause; and when the case was formerly before the Court, it was expressly decided that the plaintiff was entitled to his costs. The judgment thus concludes: "We are of opinion that the variance is immaterial, and that the mis-statement could not have prejudiced the defendant in his conduct of his defence; the act requires us to give judgment accordingly, and costs must follow as a matter of course" (b). The Master had no authority to impose any terms under which judgment should be entered according to the special finding of the jury. The plaintiff is entitled to the same benefit as if a general judgment had been entered up for him. No case can come more fully within the mischief of the 3 & 4 Will. 4, c. 42, s. 24, than this. If this case had occurred before the new rules of pleading came into operation, a

(a) This case was argued on the 24th May, before Lord Denman C. J., Littledale J., and Paterson J.; Williams J. was sitting in the Bail

Court for Coleridge J., who was absent from indisposition.

(b) *Guest v. Elwes*, 6 N. & M. 433.

count would have been added to the declaration, complaining of the defendant, for not arresting when he had an opportunity to do so, and upon the issue raised upon that count the plaintiff would have been clearly entitled to a verdict. The plaintiff in this case was not permitted to add such a count, because it was said it was the same cause of action as for an escape. It would be very hard, therefore, if he could not obtain his costs. The 74th rule of Hilary term, 2 Will. 4, 1832, is inapplicable, because there is no issue found.

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Sir *W. W. Follett* and *W. J. Alexander*, in support of the rule. It is clear that the legislature, when they passed the 3 & 4 Will. 4, c. 42, did not contemplate all the consequences which would follow from the 24th section. The question is, whether, when judgment has been entered for the plaintiff, under the 24th section, he should have all the costs, as if there were no proceeding except the judgment. The action charges the defendant with arresting *J. H.*, and afterwards allowing him to escape; the defendant pleads that he is not guilty, and that he did not arrest *J. H.* On those pleas issue is joined, and on those issues both parties go to trial. There was nothing to prevent the plaintiff adding a count for omitting to arrest, as that is a distinct cause of action from permitting *J. H.* to go at large after he had been arrested. At the trial, an application was made to amend the record, under the 23d section. Under that section the judge might have required the party making that application to pay the costs, but he could not impose any terms upon the party against whom the application was made. Now the 24th section enacts, that in all cases of variance, mentioned in the 24th section, the judge, instead of causing the record to be amended, may direct the jury to find the fact according to the evidence, and thereupon such finding shall be stated upon such record, and notwithstanding the finding on the issue joined, the Court from which the record has issued shall, if they shall think the variance

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immaterial to the merits of the case, and the mis-statement such as could not have prejudiced the opposite party, in the conduct of the action or defence, give judgment according to the very right and justice of the case. This is a very peculiar case, because there were but two issues on the record, and both those issues are found for the defendant, and yet the Court is asked to give costs to the plaintiff as if he had succeeded on both those issues. The object of the 24th section does not appear to have been fully worked out. In case of an amendment, under the 23d section, could witnesses be indicted for perjury? There is no provision in the 24th section as to costs, nor is there any discretion with respect to them given either to the judge or to the Court. [*Littledale J.* The Court is to give judgment according to the very right and justice of the case. When judgment is given for damages, does not that carry costs by the Statute of Gloucester?] In an ordinary case the jury find 40s. costs, and then the Court, by the Statute of Gloucester, give costs de incremento. If the jury had no power to award costs, there is no power in this Court to award costs de incremento. [*Littledale J.* Might not the Court give judgment ex officio, as they found the right to be with respect to costs, *Greene v. Cole(a)*?] As the jury had no power to give costs under the 3 & 4 *Will.* 4, c. 42, the Court has no power to award them. With respect to the former decision upon this case, the attention of the Court does not appear to have been called to this point on the former discussion. There are two reports of the case, the one in *Nevile* and *Manning (b)*, and the other in *Harrison's Reports (c)*, and the judgment of the Court, as reported in the latter book, is silent as to costs. Is the defendant to have no costs at all? If there had been a count in the declaration for not arresting, in addition to the count for an escape, and the defendant had pleaded the present pleas to both those counts, he would have had a verdict, and been allowed his costs on the issue as to an escape. If he is to be

(a) 2 Wms. Saund. 231—237.

(c) 2 Harr. & W. 33.

(b) 6 N. & M. 433.

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allowed no costs, he is in a worse situation, although he has recovered a verdict upon two issues, than if a verdict had gone against him upon two out of the four issues supposed. The Court has decided that it cannot set aside the verdict, or alter the record, and unless that be done, the defendant is entitled to his costs, under the 23 *Hen. 8*, c. 15, s. 1, which declares, that if any verdict happen to pass by lawful trial against the plaintiff, then the defendant shall have judgment to recover his costs. [*Patteson J.* The defendant has not got the verdict. The Court never decided that they could not set aside the verdict. The Court thought that the special finding was as much a part of the verdict as the finding on the issues, and that the whole must be taken together.] There is on the record a finding of the jury, that by reason of the defendant neglecting to arrest the creditor, the plaintiff has sustained damage to the amount of 30*l.*, but that leaves the verdict for the defendant untouched, unless the Court has power to amend the record. Unless the Court alters the record, the defendant is entitled to costs. [*Patteson J.* In *Parry v. Fairhurst (a)*, the Court of Exchequer did amend the record, and sent the case back for trial, but the power of the Court to amend does not appear to have been discussed. In the present case, the judge did not exercise any discretionary power, but refused to amend. The question of amendment in *Parry v. Fairhurst (a)*, may have been referred to the Court by consent. The Court has no power to amend by the 3 & 4 *Will. 4*, c. 42, s. 24, as that section requires the Court, if they think the variance immaterial, to give judgment according to the very right and justice of the case, notwithstanding the finding on the issue joined.] By the 74th rule of Hil. T. 2 *Will. 4*, 1832, the defendant is entitled to costs, and not the plaintiff, for the defendant has succeeded on both the issues joined. If the amendment had been made, the plaintiff must have paid costs, and in that case the defendant might have declined making any further defence to the action. The rule of

(a) 2 C. M. & R. 190.

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Hilary term says, the plaintiff shall not have costs on the issues on which he does not succeed. It was held in *Doe v. Webber* (a), that a defendant is entitled to his costs for preparing to meet a case put upon the record, but subsequently abandoned, although the defendant has attempted, but without success, to apply his evidence to that case on the record on which the plaintiff succeeded. How is the plaintiff entitled to costs? There is no action brought on which the plaintiff has recovered a verdict. He is therefore not entitled, under the Statute of Gloucester. It may be doubted whether the jury had any right to assess the damages, for the 24th section only authorizes them to find the facts according to the evidence. The plaintiff, however, by that act, has no right to the costs, for with respect to costs it is silent. If the judge had allowed the amendment, then the plaintiff might, by the Statute of Gloucester, have been entitled to his costs. If the legislature had intended, by the 3 & 4 Will. 4, c. 42, s. 24, to give costs, there can be no doubt they would have been mentioned. There is no reason why costs should be given in a case where the judge refused to amend. In an ordinary case there is a distinct finding of costs by the jury. In *Hullock on Costs* (b) it is said, "If the costs assessed by the jury be omitted in the entry of the judgment, it will be error. And where the costs de incremento were in the entry of the judgment said to be assessed per juratores, instead of per curiam, it was held to be error. But if judgment be given for the damages and costs assessed by the jury, the want of judgment for costs de incremento is not error." For that *Heines v. Guie* (c) is cited. [*Littledale J.* The reason of costs being awarded expressly by the jury, is to shew the particular amount given for costs separately from that given for damages; many cases on the subject of costs are collected in *Ward v. Snell* (d).] At all events the plaintiff cannot have

(a) 4 N. & M. 381; S. C. 2 A.
 & E. 448.

(b) 2d vol. p. 650.

(c) Yelv. 107.

(d) 1 H. Bla. 10.

the costs of his motions, which have been rendered necessary by his own negligence.

Cur. adv. vult.

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Lord DENMAN C. J., in this term, (June 9,) delivered the judgment of the Court, as follows:—The plaintiff declared as for an escape, but the evidence not establishing that, he was permitted to go into a case of omission to arrest, and on that new case he succeeded. We think that the plaintiff, having succeeded generally, ought to have the costs of the trial, and that the defendant ought to have the costs of the issues upon which he has succeeded; and that each party should bear his own costs of the application to this Court and of the argument.

Ordered—That it be referred to the Master to tax the plaintiff his general costs of this cause, and that the said Master also tax the defendant his costs upon the issues on which he has succeeded, and that each party pay his own costs of this application, and also the costs of arguing the question before the Court.

DOE on the demise of VERNON v. ROE.

JUDGMENT had been signed in this case, and a rule nisi had been obtained to set aside that judgment which had been signed, under the following circumstances:

On the 25th May, 1835, the declaration was served upon *Richards*, the tenant in possession, to appear in the following Trinity term. No appearance was ever entered.

On the 15th June, 1835, *Coleridge J.*, at the instance of the tenant *Richards*, made an order upon the lessor of the plaintiff, to deliver a particular in writing of the premises for the recovery of which the ejectment was brought.

Thursday,
May 25th.

A defendant in ejectment, who had obtained ten days' time to plead on the terms of pleading issuably, rejoining gratis, and taking short notice of trial, is nevertheless entitled to a term's notice of any step being taken, if

the plaintiff has delayed going on with the action for four terms.

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On the 30th June, *Patteson J.*, by consent, made an order that the defendant should have ten days' time to plead, after delivery of the particulars of the plaintiff's demand, pleading issuably, rejoining gratis, and taking short notice of trial, if necessary, for the next assizes.

No further proceedings were taken until the 2d February, 1837, when the plaintiff delivered a bill of particulars to the clerk of the agent of *Richards's* attorney, who, however, insisted that he was entitled to a term's notice before any step could be taken in the action, as no proceeding had taken place for more than a year.

On the 15th February, 1837, judgment was signed against the casual ejector.

On the 20th Feb. 1837, *Williams J.* made an order that the judgment should be set aside for irregularity, with costs.

A rule nisi was obtained to rescind the order of *Williams J.*, on the ground,

First, that, as the defendant had never appeared in the action, he could not be heard upon any motion to set aside the judgment;

Secondly, that, as the cause had been stayed by the order for particulars, which had been obtained at the instance of the defendant, the rule, that, where a cause has not been proceeded in for a twelvemonth, no step can be taken without a term's notice, was inapplicable;

Thirdly, that the judge had no power to give costs to the tenant *Richards*, who had not appeared. A correspondence had taken place between the attorney for *Richards* and the attorney for the lessor of the plaintiff, but it did not appear from that correspondence that there had been any waiver of the right to have a term's notice, before any further steps were taken in the action.

J. Bayley, now shewed cause against the rule for setting aside the order of *Williams J.* I. Although *Richards*, the defendant, has not formally appeared in the action, yet he was entitled to move to set aside the judgment, because the rule for judgment was in effect against him.

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II. The defendant is entitled to a term's notice. It is true that it was at his instance that the order for particulars was obtained, but the plaintiff ought to have delivered the particulars within a reasonable time after that order was obtained. There has been no waiver, in fact, of the right to obtain a term's notice. In no part of the correspondence did the attorney for *Richards* intimate that he should relinquish his right to the notice. It is a general rule, that, if four terms have elapsed since the delivery of the declaration, the defendant shall have a whole term's notice of the rule to plead, before judgment can be entered against him, and there are but two exceptions stated to this rule by Mr. *Tidd*(a), where the cause has been stayed by injunction or privilege. This case is not within either of those exceptions.

Whateley, in support of the rule. Where the defendant has obtained leave for time to plead, after the particulars have been delivered, a term's notice is not necessary. The rule was established for the purpose of preventing surprise upon the defendant; and it has been laid down, that, where the proceedings have been delayed at the defendant's request, the rule is inapplicable. Here, the order of particulars which stayed the action was obtained at the instance of the defendant; *Richards v. Harris*(b). *Goodtitle d. Ward v. Badtittle*(c) is an express authority to shew that *Richards* cannot have any costs.

Lord DENMAN C. J.—There is nothing in this case to deprive the defendant of a term's notice. *Goodtitle v. Badtittle*(c) however, shews that that part of the order is bad, which requires costs to be paid.

LITLEDAL J.—The judgment was irregular. *Richards* had no right to apply for particulars before he had appeared,

(a) 1st vol. p. 468, 9th edition.

(c) 2 W. Bla. 763.

(b) 3 East, 1.

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v.
ROZ.

but after the order for the particulars was made, the proceedings were stayed. It was the duty of the plaintiff to deliver the particulars sooner, and it was by his default that the action was delayed. By accepting the terms that the defendant should plead issuably and rejoin gratis, he did not do away with the necessity of a term's notice; but the defendant is a nominal party, and is not entitled to costs.

PATTESON J.—The plaintiff chose to wait for a year before he delivered the particulars.

Rule absolute for setting aside the order as to the costs, discharged as to the rest.

Saturday,
May 27th.

The KING v. The Inhabitants of ARDLEIGH.

A pauper, tenant in fee of freehold and copyhold land, conveyed by lease and release his freehold land to certain trustees, upon trust to sell and pay his debts, and pay the surplus, if any, to him. The release contained a covenant, on the part of the pauper, to surrender his copyhold land in D., upon

ON appeal against an order of removal, whereby *Thomas Beckey* was removed from the parish of Dedham, in the county of Essex, to the parish of Ardleigh, in the same county, the Court of Quarter Sessions confirmed the order, subject to the opinion of the Court of King's Bench upon the following case:

The pauper, *Thomas Beckey*, was for many years previous, and up to the year 1832, seised and possessed of freehold and copyhold estates, situate in the parish of Ardleigh, Langham, and Dedham, in the county of Essex, which he derived as devisee in fee under the will of his father, and to which copyhold part thereof, in the said parish of Dedham, he was, in December, 1821, admitted as tenant in fee.

the same trusts as the freehold. The release also contained a declaration that the trustees should manage the farming business of the pauper until the sale should be made. It did not appear from the case, which stated the above facts, what was the value of the property or the amount of the debts. It was held, that the pauper (who did not actually reside on the property, but in the parish) gained a settlement by a residence of forty days in the parish where the copyholds were situate, during the period between the execution of the deeds of lease and release, and a surrender of the copyhold, which was afterwards made by the pauper to a purchaser.

The pauper received the rents of the said premises from the time of his father's death down to January, 1832.

At the time of his father's death, and from thence until the 17th April, 1832, the pauper resided at Ardleigh. On the 17th April, 1832, he went to reside in Dedham, where he continued to reside from that time down to the time of the hearing of the appeal. He did not occupy the said copyhold premises, but resided during the whole time in other premises in Dedham.

By indenture of lease and release, and assignment, duly executed, dated 10th and 11th January, 1832, the said indenture of release and assignment being made between the pauper of the one part, and *P. A.* and two other persons of the other part: It was witnessed, that to the intent to enable the said pauper to provide for the demands of his several creditors, and for the nominal consideration therein mentioned, he the said pauper granted and released unto the said *P. A.*, *J. O.* and *S. A.*, all the freehold messuages and hereditaments of him the said pauper, situate, lying, and being in the several parishes of Ardleigh, Langham, and Dedham aforesaid, unto and to the use of the said *P. A.*, *J. O.* and *S. A.*, their heirs and assigns, upon trust that they the said trustees should sell the same by public auction or private contract, in one or more lot or lots, unto any person or persons whomsoever, for the best price that could be reasonably obtained for the same, and should from time to time collect and receive the rents, issues and profits of the said premises, or of such part thereof as for the time being should not be sold under the trusts aforesaid. And it was further witnessed, that for the considerations therein aforesaid, he the said pauper, for himself, his heirs &c., did covenant to and with the said *P. A.*, *J. O.* and *S. A.*, their heirs &c., that he the said pauper, or his heirs, should and would, upon request made by them the said *P. A.*, *J. O.* and *S. A.*, &c., well and effectually surrender, according to the custom of the respective manors of which they were holden, all and every the copyhold or customary messuages,

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lands, tenements and hereditaments, of him the said pauper, situate in the several parishes of Ardleigh, Langham, and Dedham aforesaid, to the only use and behoof of the said *P. A.*, *J. O.* and *S. A.*, their heirs and assigns, or as they or the survivors or survivor of them, his heirs or assigns, should order, direct and appoint, or to any purchaser or purchasers under the trusts therein declared of the same. And that in the meantime, and until such surrender or surrenders should be made, the said *P. A.*, *J. O.* and *S. A.*, their heirs or assigns, or such other person or persons as aforesaid, should be admitted under or by virtue of the same surrender or surrenders, he the said pauper, and his heirs, should stand and be seised and possessed of the said copyhold or customary hereditaments and premises, and every part thereof, with the appurtenances, in trust for the said *P. A.*, *J. O.* and *S. A.*, their heirs and assigns. And it was thereby declared and agreed, that the said *P. A.*, *J. O.* and *S. A.*, their heirs and assigns, should thenceforth stand possessed of the said copyhold or customary messuages, lands, tenements and hereditaments, upon trust to sell and dispose of the same, in the same manner, and with the same powers and authorities, as were thereinbefore declared of and concerning the aforesaid freehold hereditaments and premises.

And it was by the said indenture declared, that the said *P. A.*, *J. O.* and *S. A.*, their heirs, executors and administrators, should stand and be possessed of and interested in the monies to arise and be received by virtue of or under the sales thereinbefore authorized to be made, or to be collected and gotten in, by the ways and means therein aforesaid, or otherwise to arise from or in respect of the premises thereby granted and released, and covenanted to be surrendered; upon trust, in the first place, to pay the costs and charges in the said indenture expressed; and upon further trust to pay, *pari passu*, and without any preference or priority unto the several creditors of the said pauper, the amount

of their respective debts. And if there should be any residue or surplus, upon trust to pay the same unto the said pauper, his executors, administrators and assigns.

And in the said indenture was contained a declaration, that the trustees should manage the farming business, &c. of the said pauper, until the aforesaid sales should be made and completed, in such manner as they should deem most expedient for the benefit and interest of the estate of the said pauper.

By deed poll, dated 18th January, 1832, after reciting the trusts of the said indenture of release, of the 11th January, 1832, as hereinbefore set forth, it was witnessed, that each and every the persons, whose hands and seals were affixed thereto, did covenant and agree with the said pauper, that they would accept and take the provision made by the said indenture of release, of the 11th of January then instant, in full discharge and satisfaction of their several demands; and upon receipt thereof, execute such releases and acquittances as might be necessary for releasing the said pauper from all claims and demands in respect thereof; and also that they would not arrest or prosecute him, for or in respect of the same; with a proviso that if the said trustees should be prevented carrying the trusts of the said indenture of the 11th January into effect, then the said creditors should be at liberty to proceed for recovery of their respective debts, in the same manner as if they had not executed the said deed-poll.

On the 2d October, 1832, the said pauper, in consideration of the sum of 50*l.*, in the surrender stated to be paid to him by one *William Downes*, (who had verbally agreed to purchase the said premises, on the 11th May preceding,) out of Court, surrendered, according to the custom of the said manor of Overhall and Netherall, the said copyhold cottage and piece of land, situate in Dedham aforesaid, and holden of the said manor of Overhall and Netherall, to the use of the aforesaid *William Downes*, who was admitted

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thereto on the 20th November, 1832, to hold to him, his heirs and assigns.

Under the above circumstances, the question for the opinion of the Court is, whether, after the execution by the pauper of the said indentures of 10th and 11th January, 1832, and of the deed of assent by the creditors, of the 18th January, 1832, and from thence down to the time of admission of the said *William Downes* to the said copyhold premises in Dedham, or down to the time of the said surrender thereof to him, or during the period of any forty days after the 17th April, 1832, he the pauper continued to have an estate or interest in the said copyhold premises in Dedham, sufficient to confer a settlement upon him, and whether the pauper gained such settlement by his residence in the said parish of Dedham, during the period and in manner hereinbefore stated.

If the Court shall be of opinion that the pauper had an estate or interest sufficient to confer a settlement, then the order of sessions is to be reversed, and the order of removal to be quashed; otherwise the order of sessions to be confirmed.

Thesiger and *S. Dowling*, in support of the order of sessions. The pauper gained no settlement in Dedham during the year 1832. By the covenant to surrender the copyhold land, the pauper divested himself of all interest in it. The trustees had the equitable estate, and could compel the pauper to surrender it to any person they pleased. The trustees by the deed were to manage the farm, and receive the rents and profits. The pauper was a bare legal trustee, and did not reside upon the property. In all the cases in which it has been held that a trustee has acquired a settlement, it will be found that he was resident on the property. The situation of the pauper does not resemble that of a guardian in socage, who, according to the case of *The King v. Oakley (a)*, gains a settlement by residence on

the property of which he has the wardship. Nor is the pauper in the same situation as executors or administrators, for they have a right to dispose of the land. The situation of the pauper is not analogous to that either of a mortgagor or mortgagee, who in certain cases acquire settlements in those characters. It is true that a mortgagee, who has the legal interest, and who is in possession of the land, gains a settlement. But the pauper is not in possession of the copyhold land. A mortgagor does not gain a settlement by mere residence, if he be insolvent; *The King v. St. Michael's, Bath*(a). The pauper here is evidently insolvent. It may be said that the pauper has something beyond the legal interest; that he has some beneficial interest in the surplus. But assuming that he has, it is immaterial; *The King v. Cregina* (b). [Patteson J. In *The King v. St. Michael's, Bath*(a), Lord Mansfield seems to treat the right to the surplus as of little importance.] The party who has the real interest in the premises, is the only person entitled to the settlement; *The King v. Holm East Waver Quarter* (c). The case of *The King v. Edington*(d) is distinguishable, because there the Court treated the transaction as a mortgage, which this is not. In *The King v. Tarrant Launceston* (e), it was held, that the pauper who had conveyed every interest he had in a leasehold house to a trustee, upon trust to repay himself 10*l.*, and then to apply the rents for the separate use of the pauper's wife, during her life, and afterwards for his, the pauper's life, gained no settlement by residence on the property. In this case there is a covenant, on the part of the pauper, to surrender the copyhold; he had nothing left in him but the bare legal interest, and he did not reside on the property.

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Ryland and Turner, *contra*. The pauper, after the execution of the deed of 1832, had a legal estate in the pro-

(a) 2 Doug. 630.

(c) 16 East, 127.

(b) 4 N. & M. 455; S. C. 2 A.

(d) 1 East, 288.

& E. 536.

(e) 3 East, 226.

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perty, by which he acquired a settlement. It is admitted that where there is an absolute conveyance of the property, and the pauper fraudulently gets into possession, as in *The King v. St. Michael's, Bath* (a), no settlement is gained; but here the pauper had the legal estate. The deed, so far as respects the copyholds, was only an executory contract. If an ejectment had been brought, it must have been on a demise by the pauper. If a distress had been made, and the tenant had replevied, the parties making the distress must have made cognizance in the name of the pauper. It is doubtful whether the pauper had not some equitable estate remaining in him, but according to the case of *The King v. Oakley* (b), it is sufficient to have a legal interest. *The King v. Geddington* (c) is to the same effect. After the case of *The King v. Houghton le Spring* (d), it cannot be contended that residence in the parish, where the property is situate, is not sufficient. This case is very like *The King v. Dorstone* (e). In that case, while the pauper resided in the parish of B., a freehold estate in the same parish descended to his wife and her sisters, as coparceners. In a month afterwards, the pauper and his wife contracted to sell their share, but the conveyance was not actually executed for more than forty days after their title accrued. It was held that the pauper was settled in B., although the estate, during all the time, was in the occupation of another. In *The King v. Cregina* (f), the pauper had no estate or interest whatever in the property.

Lord DENMAN C. J.—The legal estate continued in the pauper, and he was therefore irremovable. It is true he did not reside upon the property, but he resided in the parish, which is sufficient. It was not certain that the pauper would ever be called upon to surrender the copyhold

(a) 2 Doug. 630.

(b) 10 East, 491.

(c) 3 D. & R. 403; S. C. 2 B. & C. 139. See *The King v. Llantillio Grosvenny*, 5 B. & C. 461.

(d) 1 East, 247.

(e) 1 East, 296.

(f) 4 N. & M. 455; S. C. 2 A. & E. 536.

property. The freehold property, for any thing that appears to the contrary, may be sufficient to pay off the debts, and there is nothing to shew that the pauper was divested of the real beneficial interest in this property. It is however enough for us to say, that the pauper resided for forty days in a parish where he had an estate of his own, and that he thereby gained a settlement in that parish.

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LITLEDALE J.—The pauper had the legal estate, which was sufficient to give him a settlement. It is laid down in *Nolan's Poor Laws* (a), that "it is immaterial whether the party has a beneficial interest in the estate; a mere trustee may acquire a settlement, for nobody can take the estate from him, and it is sufficient that he reside in the parish forty days, and cannot be removed from it." The pauper could not have been turned out by an ejectment. It is not clear that the pauper had not some equitable interest in the estate.

PATTERSON J.—This case, in some respects, resembles *The King v. Dorstone* (b). In that case, the pauper had entered into an absolute agreement to sell. In this case, the pauper had covenanted to surrender the copyholds to the trustees, for the purpose of paying his debts. In *The King v. Dorstone* (b), it was held, that the pauper gained a settlement by residing, not upon his estate, but in the same parish in which it was situated. The clause in the deed which relates to the management of the property, only authorizes the trustees to take upon themselves the business of farming the freehold land, and does not appear to apply to the copyhold. In *The King v. Cregina* (c), the pauper had no legal interest, and it was very questionable whether he had any equitable interest.

Order of Sessions quashed.

(a) Vol. ii. p. 105, 4th ed.

(b) 1 East, 296.

(c) 4 N. & M. 455; S. C. 3 A. & E. 536.

1637.

Saturday,
May 27th.

EDWARD BOURNE, FRANCIS BOURNE, and ANDREW
HOWERTH v. The KING.

If an inferior court pronounce an improper judgment in a case of felony, the Court of King's Bench, on a writ of error being brought, has not power either to remit the record to the inferior court, in order that the right judgment may be awarded there, or to pronounce the right judgment itself; but the prisoners must be discharged.

THE three prisoners appeared this day at the bar of the Court of King's Bench. They had been indicted, tried and convicted at the Quarter Sessions for the county of Monmouth, of a burglary. *Andrew Bourne* had been sentenced to be transported for seven years, and *Francis Bourne* and *A. Howerth* were sentenced to be transported for life. The above facts appeared by the record. A writ of error was brought, and the error assigned in substance was, that judgment of transportation had been given instead of judgment of death. The prayer of the defendants was, that the judgment should be reversed. Issue had been joined on the assignment of error.

Peacock, for the prisoners. It is admitted by the Attorney-General, that the sentence is erroneous; but it will be contended for the crown that the Court will either pass the proper sentence now upon the prisoners, or remit the record to the Court of Quarter Sessions, in order that the proper sentence might be passed by that court. But the only course this Court can legally adopt, is to discharge the prisoners. The Court of Quarter Sessions cannot give judgment, for, not having been adjourned, it has ceased to exist. Nor can this Court give judgment now: *The King v. Baker* (a) is an authority to that effect. *The King v. Kenworthy* (b) may appear at first sight to be an authority to warrant this Court in remitting the record to the Court of Quarter Sessions, in order that the right judgment may be given. But in that case no judgment had been given by the court of oyer and terminer. Here a judgment has been delivered by the Court of Quarter Sessions. This distinction was taken in *The King v. Ellis* (c). Besides, this Court cannot give judgment on a conviction in another court, where that court has any discre-

(a) Carth. 6.

(c) 8 D. & R. 173; S. C. 5 B. &

(b) 1 B. & C. 711; 3 D. & R. 173. C. 395.

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tionary power which this Court has not. In *Rex v. Kenworthy* (a), Abbott C. J. says, "that at common law, where the punishment is not discretionary, the record of an inferior court may be removed into this Court, and we may pronounce judgment, but in this instance we cannot do so." By the 7 & 8 Geo. 4, c. 29, s. 11, the judgment on a conviction of burglary is death; but the 4 Geo. 4, c. 48, enables *the court before which the offender shall be convicted* to record judgment of death, instead of passing sentence. The Quarter Sessions therefore had a discretion to record judgment of death against the prisoners, which this Court has not. But even if this Court could, under other circumstances, have given judgment, it cannot do so in the present state of the proceedings. This Court is now sitting as a court of error upon a writ of error brought by the prisoners, and can therefore merely affirm or reverse the judgment. There is a strong analogy between writs of error in civil and in criminal cases. In *Bacon's Abridg.* (b) it is laid down, that, "if judgment be given against the defendant, and he bring a writ of error, upon which the judgment is reversed, the judgment shall only be *quod judicium reverteretur*; for the writ of error is brought only to be eased and discharged from that judgment." In *Parker v. Harris* (c) this distinction is made; that, "where judgment is given for the plaintiff, and the defendant brings error, there shall only be judgment to reverse the former judgment, for the suit is only to be eased and discharged of that judgment. But where the plaintiff brings error, the judgment shall not only be a reversal, but the Court shall also give such judgment as the Court below should have given." The same rule is also laid down in *Baker v. Lads* (d). If this writ of error had been brought by the crown, the case might have been different. In *The King v. Lookup* (e) and *The King v. Ellis* (f) a

(a) 1 B. & C. 711.

(d) Carth. 253.

(b) Vol. iii. p. 118, tit. Error, M. 2.

(e) 3 Burr. 1901.

(c) 1 Salk. 262.

(f) 8 D. & R. 173; S. C. 5 B. & C. 395.

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judgment of reversal was given, and the prisoners were discharged. [*Patteson J.* In *The King v. Nicholl* (a) there was judgment of reversal.] It appears from *The King v. Walcott* (b), that if there be error in a judgment, it may be reversed by the heir, and in such a case the ancestor could not be attainted by passing judgment of death upon him. In *The King v. Howse* (c), in which there was a failure on the part of the crown to join in error, the prisoners were discharged.

Sir *John Campbell A. G.*, *contra*. It is admitted that the judgment is erroneous; but to prevent a failure of justice, this Court will either remit the record to the Court of Quarter Sessions, in order that that court may pass the right judgment, or this Court will now award the right judgment. The judgment is altogether bad; and this case is for that reason distinguishable from *The King v. Ellis* (d), where the Court had imposed a sentence of imprisonment for too long a period. In *The King v. Nicolls* (e) and *The King v. Kenworthy* (f) the Court remitted the record to the court whence it came, in order that the right sentence might be pronounced. If, however, the record cannot be remitted to the Court of Quarter Sessions, this Court, in exercise of that supreme jurisdiction which it possesses in all criminal matters, will now pass the same judgment upon the prisoners which the inferior court ought to have passed. In civil cases this Court will give such judgment as upon the record the justice of the case requires: *Le Bret v. Papillon* (g). In *Comyns' Digest* (h) it is laid down, that if the judgment upon writ of error be reversed, the Court who reverse it shall give the same judgment generally as the inferior court ought to have given. *Parker v. Harris* (i)

(a) 1 B. & Ad. 21.

(b) 4 Mod. 395; 2 Salk. 632.

(c) 3 N. & M. 462.

(d) 8 D. & R. 173; 5 B. & C. 395.

(e) 2 Str. 1227.

(f) 3 D. & R. 173; S. C. 1 B.

& C. 711.

(g) 4 East, 502.

(h) *Pleader*, (3 B 20.)

(i) 1 Salk. 262.

and *Baker v. Lade* (a) relate to civil proceedings only, and have no application to the present case. Here the judgment is erroneous; but the writ is not wrong, nor was the court without jurisdiction. No injury can be done to the convicted parties by awarding the proper judgment. If they have been rightly convicted, they cannot be aggrieved by the right judgment being passed upon them. In *The King v. Athoe* (b) a record, containing an indictment for murder, was removed into this Court, and judgment and execution were awarded. In *The King v. Garride* (c) execution was awarded. The judgment is fixed, and the record furnishes all the information the Court requires. The 4 Geo. 4, c. 48, merely alters the form and mode of pronouncing judgment. In *The King v. Ellis* (d) the punishment was discretionary.

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Peacock, in reply. In none of the cases cited for the crown had any judgment had been pronounced; but in this case the Court of Quarter Sessions have already awarded the judgment. In *The King v. Kenworthy* (e) no judgment had been given, but merely an order for judgment. The Court of Quarter Sessions cannot now amend their judgment, for then there would, as was argued in *The King v. Walcott* (f), be two records. [*Patteson J.* In *Gildart v. Gladstone* (g) the judgment was not simply one of reversal, but the same judgment was given which the Court below ought to have given.] The principle established by that case is, that the person who brings the writ of error is entitled to have all that the court below ought to have awarded to him, and therefore in that case, where error was brought by the defendant, the Court of Error held that he was entitled to judgment, not only of acquittal, but also for the

(a) Carth. 253.

(b) 1 Str. 553.

(c) 4 N. & M. 33; 3 C. 2 A.
 & E. 266.

(d) 8 D. & R. 173; 3 C. 5 B.
 & C. 395.

(e) 1 B. & C. 711; 3 D. & R. 173.

(f) 4 Mod. 395; 2 Salk. 632.

(g) 12 East, 668.

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costs of his defence in the court below. In *The King v. Garside* (a) the Court merely awarded execution on a judgment which was valid. *The King v. Ellis* (b) is an authority to shew that this cannot be sent back to the sessions. If the right judgment has not been delivered, the judgment must be reversed; and according to the argument of *Strange*, in *The King v. Pappineau* (c), it is no answer to say that the variance in the judgment is for the ease and benefit of the defendant. [*Patteson J.* There is also an anonymous case in *Salkeld's Reports* (d). When the judgment is before the Court, I do not see how it can concern us who brings the writ of error.] The prayer of the assignment of error is, that the judgment be reversed. Besides, although the quarter sessions have power to try capital offences, they never exercise it; and if the court below have given a wrong judgment, shewing that they were not aware at the time of the trial that the offence was capital, can this Court be satisfied that the conviction before that court was correct? It is too much to call upon this Court to pass sentence of death upon a criminal, which took place before a court who have stated, upon their own record, that they were incompetent to pass judgment themselves.

Sir *J. Campbell A. G.* referred to *Street v. Hopkinson* (e), in which it is laid down that the Court is not bound by an improper prayer of judgment, but will give the right judgment.

LORD DENMAN C. J.—This is a writ of error upon a judgment in the Court of Quarter Sessions, against three prisoners, who were convicted of a burglary, and sentenced for transportation. The record has been brought before

(a) 4 N. & M. 33; S. C. 2 A. & E. 266.

(b) 8 D. & R. 173; S. C. 5 B. & C. 395.

(c) 1 Str. 686.

(d) Vol. i. p. 401.

(e) 2 Str. 1055.

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us, and the learned counsel for the prisoners has pointed out the error in the judgment, and has prayed that the prisoners may be discharged. Two courses have been suggested to us on the part of the crown,—to remit the record to the Court of Quarter Sessions, that they may pass judgment,—or to take upon ourselves to award the proper judgment. It is quite clear that we have no power to remit the record to the Court of Quarter Sessions, as judgment has already been given. Then, can we pass the judgment ourselves? *The King v. Ellis (a)* is a decisive authority to shew that we have no such power. That case was very like the present. The defendant was indicted, at a Court of Quarter Sessions, for petty larceny: he was found guilty, and sentenced to be transported for fourteen years. A writ of error was brought upon that judgment, and the error assigned was, that the defendant could not, for the offence charged in the indictment, be legally transported beyond the seas for the term of fourteen years, or for any longer term than seven years. That case was argued on the part of the crown by Mr. Baron *Parke*. He contended, first, that the judgment of transportation for fourteen years was warranted by law; secondly, that at all events it was good as a judgment of transportation for seven years; thirdly, that if the judgment could not be supported, the prisoner might be remanded to the court below, in order that he might receive such judgment as the law would warrant. The Court took time to consider, and ultimately reversed the judgment of the court below. It never occurred to Mr. Baron *Parke*, or to the Bench, that there was any authority in this Court to pronounce the right judgment. It is scarcely possible to suppose that if this Court is possessed of the authority to pronounce the right judgment, that that argument would not have been urged in *The King v. Ellis (a)*. In the absence of all direct authority, we think we have not now the authority either

(a) 8 D. & R. 173; S. C. 5 B. & C. 395.

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to pronounce the right judgment, or to remit the record to the sessions.

LITLEDALE J.—The judgment is admitted to be erroneous; and it is said that the question is, whether we are to send the record down to the Court of Quarter Sessions, that they may pronounce the right judgment, or to pronounce it ourselves. We have no authority to send the record back to the inferior court. In *The King v. Kemoorthy* (a) the record was sent back; but in that case this Court was of opinion that no judgment had been pronounced by the inferior court. In this case, however, the Court have pronounced judgment. Then, can we amend the record by pronouncing the right judgment now? In *Hawkins' Pleas of the Crown* (b) there is the following passage:—"It is said by Sir *Edward Coke*, (3 Inst. 2, 10,) that if the judgment be erroneous, both that and the execution thereupon, and all former proceedings, shall be reversed by writ of error, but if the execution be erroneous, that only shall be reversed." Although it is said that the proceedings shall be reversed, that must mean that they are altogether a nullity. It is not said in *Hawkins* that this Court can pronounce the right judgment. A reference has been made to the cases where a distinction has been taken between a writ of error brought by the plaintiff and by the defendant. Without determining whether there be any such distinction, it seems to me that we are bound to pronounce the same judgment as was done in *The King v. Ellis* (c). It was not suggested in that case that this Court had any authority to pronounce the right judgment, nor is there any ground to suppose that any such power exists.

PATTESON J.—The first question is, whether any judgment has been pronounced by the Court of Quarter Ses-

(a) 3 D. & R. 173; S. C. 1 B. 8th ed.

& C. 711.

(c) 8 D. & R. 173; S. C. 5 B.

(b) Vol. ii. ch. 50, s. 19, p. 655, & C. 395.

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sions. If there is no judgment at all, then *The King v. Kenworthy* (a) is an express authority to shew that this Court will send the record back to the Court of Quarter Sessions, in order that a judgment may be awarded. Such a course would, in effect, be a quashing of the writ of error. I cannot, however, think that we are at liberty to treat what was done after the conviction as no judgment. The Court of Quarter Sessions had jurisdiction over this crime; the prisoners were convicted, and judgment was pronounced in form. What then is to be done? Is the record to be sent to the sessions, that they may pass the right judgment? Where an erroneous judgment has been given, there is no instance in which the record has been sent back, in order that the court below may pronounce another judgment. It is true that a record is sent back from the Court of Exchequer Chamber to the inferior court, in order that the judgment may be enforced; but the reason of that is, that the Court of Exchequer Chamber has no means of enforcing the judgment. The next question is, whether this Court can pass the proper judgment on the prisoners. According to *Parker v. Harris* (b), there is a distinction between the case where the writ of error is brought by the plaintiff, and where by the defendant. It would appear, from an anonymous case in *Salkeld* (c), that there is no such distinction. It is not stated in the case in *Salkeld* who brought the writ of error. However, in *Gildart v. Gladstone* (d), Bayley J. remarks, that that case is contrary to *Parker v. Harris* (b); but still that is only a *dictum*, for the judgment in *Gildart v. Gladstone* (d) is not inconsistent with *Parker v. Harris* (b). The cases cited by the Attorney-General, where no judgment was given at all, are not in point. *The King v. Nicholl* (e) does not apply, because there the error was in the indictment itself. Here the question does not arise

(a) 3 D. & R. 173; S. C. 1 B. & C. 711.

(b) 1 Salk. 262.

(c) 1 Salk. 401.

(d) 12 East, 668.

(e) 1 B. & Ad. 21.

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either on the indictment or the verdict: the record is complete. I should have felt considerable doubts upon this subject were it not for the case of *The King v. Ellis* (a). This point was not argued in that case; but considering the persons who argued the case and who delivered the judgment, I think it is an authority upon which we can act. I do not decide this case with reference to any of the statutes which have been cited, but think it better to lay down the broad and general rule.

The prisoners were discharged (b).

(a) 8 D. & R. 173; S. C. 5 B.
& C. 395.

(b) *Williams J.* was in the Bail
Court.

Tuesday,
May 30th.

A tender was made in these words, "I have called to tender 8*l.* in settlement of R.'s bill." It was held, that as the meaning of the words was ambiguous, it was for the jury to consider whether the tender was conditional.

ECKSTEIN v. REYNOLDS and another.

DEBT on simple contract, for goods sold and delivered. Plea: nunquam indebitatus, except as to 8*l.*, and as to that a tender. At the trial, before Lord *Denman* C. J., at the sittings in London, after Michaelmas term, 1835, the plaintiff proved that goods had been sold and delivered to the defendants to the amount of 8*l.* The defendants called a witness, who stated that he went to one of the plaintiffs, and said to him, "I have called to tender 8*l.* in settlement of *Reynolds's* bill." This money the plaintiff, to whom the tender was made, refused to accept. It was objected, on the part of the plaintiff, that the witness proved only a conditional offer to pay 8*l.*, and that therefore there was no proof of a legal tender. The learned judge, who was not asked to determine the question, left it to the jury to say whether the offer was conditional. They found that the words imported an unconditional offer, and a verdict passed for the defendants. In Hilary term, 1836, *Thesiger* obtained a rule nisi for a new trial, on the ground that the offer to pay 8*l.* was conditional only, and that the question,

whether it was conditional, ought to have been determined by the judge, and not left to the consideration of the jury.

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Alexander (and *C. C. Jones* was with him) now shewed cause. Undoubtedly a conditional offer to pay money is not a legal tender, but the words in the present case do not necessarily import a condition. Their meaning was ambiguous, and therefore it was for the jury to determine what it really was. That is an unquestionable rule of law in mercantile contracts; *Clayton v. Gregson* (a), *Bold v. Rayner* (b). (He was stopped by the Court.)

C. R. Turner, in support of the rule. The offer made to pay the money was conditional, as the money was offered in settlement of the account, which imported a condition. A person making a tender must not make it upon any terms, because if the person to whom the tender is made were to accept the money, he might be prejudiced by the admission; *Peacock v. Dickerson* (c), *Cheminant v. Thornton* (d). In *Mitchell v. King* (e), the defendant produced a certain sum of money, and said, "There is your due if you like to take it." The plaintiff said, "He would take it in part, or a pound in part, and give a receipt for it." The defendant then replied, "I do not admit of its being taken in part, but as a settlement." The plaintiff refused to take the money, and this was held not to be a good tender.

Whether the offer is conditional or not, is a question for the Court. In *Finch v. Brook* (f), there was a special finding of the jury, and the Court decided the tender to be bad.

Lord DENMAN C. J.—If the witness had said, I am come to settle your account, and here is the money, the tender would have been good. The order in which the

(a) 4 N. & M. 602.

(b) 1 M. & W. 343.

(c) 2 C. & P. 51, n.

(d) 2 C. & P. 50.

(e) 6 C. & P. 237.

(f) 1 Bing. N. C. 253.

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words are spoken cannot make any difference. The meaning of the words was ambiguous, and it was therefore properly left to the jury to say what the meaning was.

LITLEDALE J.—It was very proper to leave to the jury the question, whether the tender was or was not conditional.

PATTESON J. concurred.

Rule discharged.

Tuesday,
May 30th.

LANE and another v. GLENNY.

1. The defence to an action of assumpsit on an attorney's bill, that no proper bill, duly signed, had been delivered, must be pleaded specially.

2. *Quere*, whether an attorney's bill for business done in conducting a suit, delivered pursuant to the stat. 3 Jac. 1, c. 7, and 22 Geo. 3, c. 23, need state the Court in which the business was done.

ASSUMPSIT. Plea: non assumpsit. At the trial, before Lord Denman C. J., at the sittings in Middlesex, after Michaelmas term, 1835, it appeared that this action was brought to recover the amount of an attorney's bill, for business done in conducting an action at law. A bill had been delivered within one month before the action was brought, but it was not stated in the bill delivered, in what Court the action had been instituted. It was objected for the defendant at the trial, that the plaintiffs could not recover on account of the omission, in the bill which had been delivered, of the name of the Court in which the action was commenced. A verdict was found for the plaintiffs, and the Lord Chief Justice gave the defendant leave to move to enter a nonsuit. In Hilary term, 1836, *Mansel* obtained a rule nisi accordingly, to set aside the verdict and enter a nonsuit, and he cited *Hill v. Mills* (a), and *Lester v. Lazarus* (b).

Crowder now shewed cause. Assuming the objection to be fatal, it cannot be taken advantage of under the plea of non assumpsit. It was expressly held by *Parke B.*, in *Moore v. Dent* (c), that, since the new rules, unless a defend-

(a) 2 Dowl. P. C. 696.

(c) 1 Moo. & Rob. 462.

(b) 2 C. M. & R. 665.

ant has pleaded the non delivery of a bill of costs, he cannot take the objection. In *Beck v. Mordant* (a), the Court of Common Pleas seem to have been of the same opinion.

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Ball and Mansel, in support of the rule. According to the report of the case of *Beck v. Mordaunt*, in *Dowling's Reports* (b), *Park J.* doubted whether the rule of *Parke B.*, in *Moore v. Dent* (c), was correct. This case resembles *Morgan v. Ruddock* (d), which was an action to recover an apothecary's bill. In that case it was objected, that the plaintiff had not proved that he had been actually practising as an apothecary, prior to and on the 1st of August, 1815, or that he had obtained a certificate to practise as an apothecary, pursuant to the provisions of the statute of 55 Geo. 3, c. 194. It was contended, on the part of the plaintiff, that the objection could not be taken, as non assumpsit only was pleaded. *Patteson J.*, however, decided that the defendant might avail himself of the objection, under the plea of non assumpsit. [*Littledale J.* In the case of the apothecary, by the terms of the act of parliament, no promise to pay can be implied, unless he be duly qualified.] So with respect to the defendant, there is no promise until the bill has been delivered. The words of the statute of *James* (e) are, "that all attorneys shall give a true bill unto their clients, of all charges concerning the suits which they have for them, subscribed with his own hand and name, before such time as they or any of them shall charge their clients with any the same fees or charges."

LORD DENMAN C. J.—It has been repeatedly decided, that this objection must be specially pleaded. We think it better not to disturb those decisions.

LITTLEDALE J.—The cases with respect to apothecaries

(a) 2 Bing. N. C. 140.

(d) 4 Dowl. P. C. 311.

(b) 4 Dowl. P. C. 112.

(e) 3 Jac. 1, c. 7.

(c) 1 Moo. & Rob. 462.

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were decided according to the words of the act of parliament, which provide that no apothecary shall be allowed to recover his charges, unless he shall, on the trial, prove that he was duly certificated.

PATTERSON and WILLIAMS J. concurred.

Rule discharged.

Saturday,
 June 3d.

DOE on the several demises of JAMES BURFITT EDWARDS and others v. GUNNING and another.

1. The production of the original will, with the act of the Ecclesiastical Court, ordering probate, is sufficient evidence of the title of an executor, without accounting for the non-production of the probate. And where, by the practice of an Ecclesiastical Court, no book was kept, but grants of probate were recorded by a minute indorsed on, or entered at the foot of, the original will,

and written by the officer of the Court:—Held, that the production of the original will, with such minute upon it, was sufficient evidence of the executor's title.

2. Where, to prove the title of an administrator, an exemplification was offered in evidence, which was an exemplification not only of the letters of administration in question, but also of certain other letters of administration, on one piece of parchment, and covered by one 3*l*. stamp:—Held, that the exemplification was sufficiently stamped.

3. Lands sought to be recovered in ejectment, were described in the declaration as "situate in the county of S.," without any other local description:—Held, on motion in arrest of judgment, (*Littledale J.* dubitante,) that the declaration was good.

EJECTMENT for lands, situate in the county of Somerset. In the declaration, the lands were only described as "ten acres of land, situate in the county of Somerset," without any other description. On the trial, at the Somersetshire spring assizes, 1836, before *Bolland B.*, it appeared that part of the lands were situate in the parish of Hornblotton, and part in the parish of Shepton Mallet; that *Thomas Higgins*, being seised in fee of the part of the lands in Hornblotton, by his will, bearing date 29th July, 1777, demised his lands in Hornblotton to the use of *John Higgins*, for life, remainder (after divers limitations, which never took effect) to the use of the only daughter of *John Higgins* and the heirs of her body, remainder to the use of the right heirs of *John Higgins*. By indenture, dated 1st November, 1794, *John Higgins*, being tenant for life of the lands in the said parish of Hornblotton, and tenant in fee of those in Shepton Mallet, demised the lands in Horn-

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blotton and in Shepton Mallet to *Robert White*, for the term of 1000 years. By indenture, dated 21st April, 1806, the residue of this term was assigned to *Jane Ashford*, and by another indenture, dated October 20, 1813, the residue then remaining of the term was assigned to *Grace Green*. The will of *Grace Green*, dated 18th February, 1805, was proved in the Ecclesiastical Court at Wells. By her will she appointed *John Padfield* her sole executor. In 1815, a fine was levied of the premises in Hornblotton, by *John Higgins*, *Mary Ann Gifford* his daughter, and *William* her husband, to bar the estate tail. By indenture, dated 10th February, 1815, purporting to be made between *John Padfield*, executor of *Grace Green*, of the first part, *John Higgins* of the second part, *W. Gifford* and *Mary Ann* his wife of the third part, and *John Tucker* of the fourth part, all the lands in Hornblotton and Shepton Mallet were attempted to be assigned to *Tucker*, for the residue of the term of 1000 years, but the assignment was never executed by *Padfield*. *Padfield* died in 1816, *J. Higgins* in 1818, and *J. Tucker* in 1819. *Padfield's* will was proved in 1816, in the Ecclesiastical Court at Wells, by the executors of *J. B. Edwards*, one of the lessors of the plaintiff. Letters of administration to the effects of *J. Tucker*, with will annexed, were granted to *Sarah Tucker*, his widow; and after her death, letters of administration de bonis non, of *J. Tucker*, were granted to *Robert Tucker*, another of the lessors of the plaintiff. By indenture, dated 28th February, 1835, between the said *J. B. Edwards* of the one part, and *Sarah Tucker* of the other part, reciting the death of *J. Padfield* and the appointment of *J. B. Edwards* his executor, *J. B. Edwards* assigned both parcels to *Sarah Tucker*, for the residue of the term of 1000 years. *Sarah Tucker* died in the latter end of 1835, and by her will appointed *Harry Jelly*, one of the lessors of the plaintiff, her executor. The probates of the wills of *Grace Green* and *John Padfield* were not produced, nor was any evidence given of a search for them, in order to let in secondary evidence.

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On the part of the lessors of the plaintiff, there was offered in evidence an exemplification of letters of administration to the effects of *John Tucker*, with will annexed, granted to *Sarah Tucker*, his widow, and also of letters of administration de bonis non of *John Tucker*, granted to *Robert Tucker*, being one exemplification with only one *Sl.* stamp. To prove the title of *J. Padfield*, as executor to the will of *Grace Green*, they produced from the Ecclesiastical Court at Wells, an instrument, purporting to be the original will, with the following indorsement, in the handwriting of Mr. *Parfitt*, the deputy registrar—"Proved on the 5th August, 1819, before the worshipful *John Turner*, clerk, M.A., surrogate, &c. by the oath of *John Padfield*, the sole executor within named. Effects under 2000*l.* Sealed." An instrument, purporting to be the original will of *J. Padfield*, with an indorsement of precisely similar import as the above, was produced to prove the title of *Edwards* as executor of *Padfield*. Evidence was also given, that in the Ecclesiastical Court at Wells there is no original book of acts; but the act of the Court in granting probate is invariably indorsed on the original will, which is the only record of the proceeding. Objection was taken to the admissibility of each of these instruments in evidence. The verdict passed for the lessors of the plaintiff, with leave to the defendants to move to enter a nonsuit, both on account of the insufficiency of the stamp on the exemplification, and the inadmissibility of the original wills of *Grace Green* and *Padfield*; and also to move in arrest of judgment, on the ground of the omission of all local description of the tenements in the declaration, except the name of the county. A rule nisi having been obtained on all these points,

First point:  
The production of the original will with the act of the Ecclesi-

*Erle* and *Fitzherbert* now shewed cause. I. As to the point relative to the admissibility of the instruments produced from the Ecclesiastical Court of Wells, as primary evidence, without notice to produce the probates, the case of *Cox v.*

*Allingham* (a) is relied upon. In that case, the probate act book of the Prerogative Court of Canterbury, containing an entry of a will having been proved, and of probate having been granted to the executors therein named, was admitted by the Master of the Rolls as evidence of those persons being the executors, without accounting for the non-production of the probate. In the diocese of Bath and Wells, the practice is not to keep a probate act book, but to make an entry of the will having been proved on the original will itself, in the handwriting of the deputy registrar. It is clear that the principle applies equally to this mode as to the former. They are merely different methods adopted by different Courts, of recording their acts; and if the record is admissible, when drawn up, in one method, it is so in the other. An instrument similar in form to this, was received in evidence in *Gorton v. Dyson* (b). [*Littledale J.* That was after notice to produce the probate.] It is only cited to shew the admissibility of an instrument in this particular form. Where an assignee of an executor has to deduce title, as in the present case, through the executors of several different wills, it would be unreasonable to require him to trace out the rightful holder of each probate, for the purpose of giving him notice to produce it, when the original record will answer every purpose.

II. With respect to the exemplification, the object must be considered for which that evidence was adduced. It was necessary to shew title as representatives of *John Tucker*, for which an exemplification of letters of administration, with his will annexed, granted to *Sarah Tucker*, was tendered, and also of letters of administration de bonis non of *John Tucker*, granted to *Robert Tucker*, covered by a single stamp. By the Stamp Act (c), a 3*l.* duty is imposed on every "exemplification under the seal of any ecclesiastical court in England, of any record or proceeding therein." It is submitted that this is an exemplification of

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astical Court  
granting probate, is primary evidence of the title of an executor.

Second point :  
An exemplification of administration granted to S., and of administration de bonis non granted to R., produced to prove R.'s title, is rightly stamped with a 3*l.* stamp.

(a) 1 Jacob, 514.

(b) 1 Br. &amp; Bi. 219.

(c) 55 Geo. 3, c. 184, Schedule, Part ii.

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the record of what the Ecclesiastical Court has done with respect to the effects of *John Tucker*. It is the exemplification of a single proceeding, for the purpose for which it was adduced. The lessors of the plaintiff do not trace through *Sarah Tucker*, who had the first letters of administration. As far as concerns those letters, the exemplification is of a mere recital. An exemplification of the late proceeding, (which was all that was required,) could not be produced, without having the former included under it also.

Third point :  
No specific  
description of  
lands required  
in ejectment.

III. As to the motion in arrest of judgment: the premises are described in the declaration as "ten acres of land, with the appurtenances, situate in the county of Somerset." This is all that is necessary to support a declaration in ejectment. The reason for which it is alleged, that a more specific description is requisite, is, that the sheriff may know how to deliver possession. But the writ of possession was not granted at all until the reign of *Hen. 8 (a)*, and in the origin of the action of ejectment, the lessor of the plaintiff could only recover damages. To shew that a judgment in ejectment might be good, although no writ of possession could be issued upon it, the old practice, when the term was considered substance and not amendable, may be referred to. If the term had expired before the trial, the plaintiff was not nonsuited, but was permitted to proceed for his damages and costs, although not for the recovery of the land; *Capel v. Saltonstall (b)*; hence the validity of a judgment in ejectment does not depend on the practicability of grafting a writ of possession on it. In the case of *Doe d. Rogers v. Bath (c)*, all description whatever of the local situation of the tenement was omitted; and there, pending a rule nisi to arrest judgment, leave was given to amend. In *Cottingham v. King (d)*, a declaration in ejectment, in which the premises were described by their names, as situate in the county of Roscommon, in Ireland, without any

(a) See Bac. Abr. Ejectment  
(A), and 7 Edw. 4, b, there cited.  
(b) 3 Mod. 248.

(c) 2 N. & M. 440.  
(d) 1 Burr. 623.

name of vill or township, was held good after verdict on error; *Goodtitle v. Walter* (a). The general rule with respect to the immateriality of local description, in personal actions, is laid down in *Ware v. Boydell* (b).

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*Barstow*, contra. I. The decision in *Cox v. Allingham* (c) First point. cannot stand on general principles. It arose from a misapprehension; the distinction between the character of an administrator and an executor being lost sight of. The character of the former is conferred by the ordinary. He confers it generally according to a discretion vested in him by law. The exercise of that discretion is exhibited by his judgment, called an act of Court, entered in the registry of the diocese; therefore that entry is primary evidence of the administrator's authority. But the character of the executor is conferred by the will itself; and therefore the probate or official copy of the will, having the seal of the Court annexed, is primary evidence of his character, and the entry in the books is only admissible as secondary evidence, where the primary is not attainable. It is clear from the reference in the report of the case of *Cox v. Allingham* (c), that the Master of the Rolls relied on the cases cited by Mr. Phillips, in his work on Evidence (d), without advertent to the fact that those cases related to administrators, and not to executors; *Elden v. Keddell* (e), *Davis v. Williams* (f), and on *Hoe v. Nelthrope* (g) and *Rex v. Haines* (h); which only shew that an examined copy of the probate is secondary evidence. No case at all can be found which supports the proposition laid down in *Cox v. Allingham* (c). And on principle it seems impossible to contend, that if the probate is, as is acknowledged, the best and primary evidence, an entry in the books of the Ecclesiastical

(a) 4 Taunt. 671.

(b) 3 M. & S. 148.

(c) 1 Jacob, 514.

(d) 1 Phillips on Evidence, 317,

3d ed.; p. 375, &c. 6th ed.

(e) 8 East, 187.

(f) 13 East, 232.

(g) 3 Salk. 154.

(h) Skin. 583.



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Court can also be primary evidence, thus placing both on the same footing. *Shepherd v. Shorthose* (a) shews that if the probate is lost, an exemplification is granted to supply its place. *Noell v. Wells* (b) and *Allen v. Dundas* (c), shew the conclusive character attributed by the Courts to the seal of the ordinary.

Second point. II. The exemplification in question is of two distinct proceedings, with reference to one property; each answers the description in the Stamp Act. They are not like different parts of a record, but different records. One stamp, therefore, is insufficient.

Third point. III. It cannot be argued, that because the writ of possession is posterior in historical origin to the action of ejectment, therefore a judgment in ejectment need not have sufficient accuracy to found a writ of possession. No case can be cited in which a total omission of local description was upheld. *Doe d. Rogers v. Bath* (d) shews that a total omission of county as well as parish, is fatal; leave was indeed given to amend, but it appears from the report that this was done in the absence of counsel for the defendant. In *Doe d. Marriott v. Edwards* (e), the learned judge gave leave to amend, where the name of the parish was misstated in the description of the premises in the declaration, which shews that he held the statement a material part.

*Cur. adv. vult.*

Lord DENMAN C. J., on a subsequent day, (June 10,) delivered the judgment of the Court in this case, and also in that of *Doe d. Bassett v. Mew* (f).

First point. In these cases the same point arose which had been

(a) 1 Str. 412; Bull. N. P. 246.

(d) 2 N. & M. 440.

(b) 1 Levinz, 235.

(e) 6 C. & P. 208.

(c) 3 T. R. 125.

(f) *DOE d. BASSETT and WOOD v. MEW.*

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THIS was also an ejectment, tried at the spring assizes, 1836, for Hampshire, before *Littledale J.* The point which arose was similar to the

decided by the Court of Chancery in the case of *Car v. Allingham* (a), which was cited in the argument, and which was also decided upon several earlier authorities in this Court. We think that this authority ought not to be disturbed, and therefore this rule must be discharged. In *Doe d. Edwards v. Gunning* there was another point, namely, that the exemplification was not properly stamped. It was stamped with a 3*l.* stamp only, though it contained two

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Second point.

(a) 1 Jacob, 514.

first point in *Doe d. Edwards v. Gunning* (a). The lessors of the plaintiff proposed to prove a part of their case by means of an outstanding term, which had vested in one *William Rayner*, who died in 1823, and had appointed one of the lessors of the plaintiff his executor. His will was proved in the Ecclesiastical Court of the diocese of Bath and Wells, but the probate was not produced. An officer of the registry of the diocese was called, who produced the original will, at the foot of which was the following entry:

“ 19th day of September, 1823.

“ *Maria Rayner*, *William Wood*, and *F. Wood*. The above-named executors were duly sworn, well and faithfully to administer the goods, chattels, and credits, of the above-named *William Rayner*, the testator, deceased. They further made oath, that all the goods, chattels, and credits, of the said testator, at the time of his death, did not amount in value to 1000*l.* And they lastly made oath, that the contents of the paper writing hereunto annexed, and to which they have severally subscribed their names, are true, Before me, *J. Richards*, surrogate.

“ 23d September, 1823, Probate passed the seal to *Serle*.—*C. W.*”

This last line was written by *Charles Woolrich*, deputy registrar, and *Serle* was a proctor. This was, according to the practice of the Court, the only entry of the granting of the probate. It was objected at the trial, that the original will and entry were only admissible as secondary evidence, and that the probate should have been produced, or its absence accounted for. *Littledale J.* received the evidence, reserving the point. Verdict for the lessors of the plaintiff. A rule nisi to enter a nonsuit having been obtained by *Butt*,

*Erie* now showed cause. It had been twice decided, that the entry in an act book is original evidence of grant of the letters of administration; and on the same principle, the authentic record of the Ecclesiastical

(a) *Ante*.

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other administrations. That, however, was purely accidental. It was only matter of recital, and we do not think that the objection can prevail. There was another point also, which was taken in arrest of judgment; which was, the omission of the parish in the declaration. We are of opinion, however, that this is immaterial, and the rule will be discharged.

Third point.

LITTLEDALE J.—I confess that I have great doubt on the last point, because there is no opportunity of demurring to the declaration.

Rule, in both cases, discharged.

Court is original evidence of the probate of a will; *Elden v. Keddell* (a), *Davis v. Williams* (b). He relied also on *Cor v. Allingham* (c).

*Butt*, contra, contended that there is a distinction between the proof of letters of administration, and the proof of probate of a will. Nor is the mode of proof similar to that offered in the cases cited. The entry in the act book is the record of the original authority of the Court, by virtue of which letters of administration are afterwards made out; *Elden v. Keddell* (a). The entry on the original will here produced, is a memorandum, signed only by a clerk, and made after probate has issued, that the executors have made the necessary declaration. The case of *Davis v. Williams* (b) may be distinguished on another ground; there the evidence was not tendered on behalf of a plaintiff, to establish his title, but against a defendant, sued as administratrix.

*Cur. adv. vult.*

(a) 8 East, 187.

(c) 1 Jacob, 514.

(b) 18 East, 232.



1837.

Thursday,  
June 8th.

## HASLOCK v. FERGUSSON.

**ASSUMPSIT** for money had and received. Plea, non assumpsit. At the trial before Lord *Denman* C. J., in London, at the sittings after Michaelmas term, 1835, it appeared that the defendant carried on a retail business as a woollen draper in King Street, Covent Garden, and also in St. Martin's Lane, and that during the year 1834, up to the month of August, he had been in the habit of supplying goods to a Mrs. *Barnes*, a haberdasher, &c. in Jermyn Street. In that month Mrs. *Barnes's* account with the defendant being very large, amounting to about 450*l.*, the defendant's shopman, *Hobson*, who managed the business in King Street, intimated to her that he could not supply her with any more goods unless she agreed to liquidate her account by payments of 20*l.* a week. This she agreed to do, but in the month of October following *Hobson* refused to supply her with more goods; but on her reducing the account to between two and three hundred pounds, he continued to supply her, she undertaking to continue her payments of 20*l.* a week. It also appeared that *Hobson*, with whom Mrs. *Barnes* generally transacted business, had pressed her for payment of the account, and that she had been arrested in September, but it did not appear by whom. In the following November, Mrs. *Barnes* called upon the plaintiff, who was a wholesale silk warehouseman in the city, and expressed a wish to have goods on credit, giving a reference to the defendant in King Street. The plaintiff sent to Mr. *Fergusson's*, in King Street, to inquire into the responsibility of Mrs. *Barnes*, and on asking for Mr. *Fergusson*, a person came forwards, (who afterwards turned out to be *Hobson*,) who gave Mrs. *Barnes* a good character for solvency; and it appeared in evidence that he was authorized to do so by the defendant, who had himself received a similar character of Mrs. *Barnes* before she commenced

*B.* was indebted to the defendant in a large sum for goods, and the defendant, in August, refused to supply any more, unless she commenced liquidating her account by weekly payments. In the month of October he actually discontinued any further supply, but *B.* having reduced her account about one-half, he recommenced supplying her. In November the plaintiff made an application to the defendant as to the credit of *B.*, by whom the reference was given to the defendant, who gave a good character of *B.* Upon this the plaintiff supplied *B.* with goods, which she disposed of under prime cost, and applied the greater part of the proceeds in discharging her debt to the defendant. In an action for money had and received by the plaintiff against the defendant, on the ground that the goods had been obtained by fraud—Held, that the defendant's representation, not being in writing, was inadmissible under the 9 *Geo.* 4, c. 14.

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dealing with him. Upon this representation the plaintiff furnished several parcels of goods to *Mrs. Barnes*, to the amount of nearly 400*l.*; and it appeared that as soon as *Mrs. Barnes* received them, she resold them under prime cost to different shops in the metropolis, and with the proceeds paid off former creditors,—a great part of the money being paid to the defendant. *Mrs. Barnes* afterwards became a bankrupt. The representation of *Hobson* as to *Mrs. Barnes*' credit was objected to, as its effect was to charge defendant by reason of a representation concerning the character and ability of another, and was not in writing, according to the 9 *Geo.* 4, c. 14, s. 6. The lord chief justice was of this opinion, and that there was no evidence to charge the defendant, except through the representation of *Hobson*, and he accordingly nonsuited the plaintiff.

Sir *J. Campbell* A.G., in the ensuing Hilary term, having obtained a rule to set aside the nonsuit, on the ground of the improper rejection of evidence, and also that the case, as it stood, should have been left to the jury;

Sir *F. Pollock*, *Kelly* and *Arnold* now shewed cause. The statute 9 *Geo.* 4, c. 14, s. 6, has already been considered in *Lyde v. Barnard* (a); but that case is hardly applicable here. The action here, in point of form, is not for a false representation, but that clearly is the gist of the action. The representation was made by the plaintiff's shopman, who himself had received a good character of *Mrs. Barnes*. Now it cannot be contended that a shopman is the agent of his master to make representations as to character. Unless therefore it be proved that the shopman was authorized by the defendant to make any representation as to *Mrs. Barnes*, the evidence would be inadmissible at common law. But admitting that the defendant, having himself received a good character of *Mrs. Barnes*, had authorized his shopman to give the same character of her,—is not this making a representation of the character and ability of another, within the very words of

(a) 1 M. & W. 101.

*Tenterden's* act? That act was passed to obviate the inconveniences which had arisen from the decision of *Pasley v. Freeman* (a), it having been found that after that case action after action was brought to charge parties upon loose and casual expressions as to the credit of third parties, none of which were unsuccessful. Here, if the representation as to *Mrs. Barnes* be taken out of the case, the plaintiff has no locus standi; it is evidently, therefore, the foundation of the action. In *Abbotts v. Barry* (b), where it appeared that one *Phillips* was indebted to the defendant, and was insolvent, and the defendant pointed out to him a plan of getting goods on credit, and directed the reference to be made to him as to *Phillips's* solvency, with the proceeds of which goods *Phillips* paid the defendant,—it was held that the plaintiff, who sold the goods, was entitled to recover back the price which came into the hands of the defendant, as no property passed in the goods, the sale being effected by fraud. But that case was before the 9 Geo. 4, c. 14, s. 6. There, also, there was not only a representation by the defendant, but the whole plan was concocted by him. It may be admitted, perhaps, that if the representation were one of many facts shewing fraud in the defendant, it might be admissible in evidence; but in this case it was the only fact to charge the defendant, and it could not be coupled with any other facts, of which the defendant was ignorant. It was not pretended at the trial that there was any other evidence to be given.

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Sir J. Campbell A. G. and *Wightman*, contra. The plaintiff contends that there was a conspiracy between *Barnes* and the defendant to obtain the plaintiff's goods; and therefore as it is a question of fraud, the plaintiff, finding the price of his goods in the defendant's hands, may waive the tort, and sue on the contract at common law.

(a) 3 T. R. 51.

(b) 5 Moore, 98.

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v.

FERGUSSON.

The point on the statute therefore does not arise. *Abbotts v. Barry* (a) has been referred to, and the Court must decide whether that action could be maintained now. It was equally necessary then, as in the present case, to prove the false representation of the defendant. It is submitted that the object of Lord *Tenterden's* act was to prevent the evasion of the Statute of Frauds, by parol guarantees being substituted for written ones, and was not intended to apply to cases of fraud, but to contracts only. It is said that the class of cases beginning with *Pasley v. Freeman* (b) were always successful; but on reference to *Harrison's Digest* (c), that will be found to be not so. The cases in question, however, are only where collateral representations have been given as to the credit of third parties. The Statute of Frauds has never been held to apply where the defendant is in any way primarily liable (d). The words relied on by the defendant, in 9 *Geo. 4*, c. 14, s. 6,—“no action shall be brought whereby to charge any person upon or by reason of any representation, or assurance made or given, concerning or relating to the character, conduct, credit, ability, trade, or dealings, of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or reference be made in writing, signed by the party to be charged therewith,”—clearly do not apply to cases like *Abbotts v. Barry* (a) or the present, where trover might have been brought for the goods, and an action for money had and received is of the same nature. The intent or purpose here of making the representation was, that the defendant should fraudulently get the proceeds of the goods. The case therefore is not within the purview of the statute. The plaintiff charges conspiracy, and the evidence of *Hobson* in making

(a) 5 Moore, 98.


(b) 3 T. R. 51.

(c) 1 Harr. 569, 2nd ed.

(d) See *Stephens v. Squire*, 5 Mod. 205; *Howes v. Martin* 1Esp. 162; *Hodgson v. Anderson*, 3B. & C. 842; *Edge v. Frost*, 4D. & R. 243; *Crowfoot v. Gurney*,

2 M. &amp; Scott, 473.

the representation, with the other facts in the case, would have been abundant evidence for the jury to have found a conspiracy to obtain these goods. It has been said that false representation is the gist of this action; but that is not so; for suppose, as in *Hill v. Perrott (a)*, goods of the plaintiff had been obtained by fraud, and the proceeds had found their way into the hands of the defendant, proof of that fact would make a *prima facie* case for the plaintiff, which must be met by the defendant. The defendant then sets up the sale of them to him by Mrs. *Barnes*. The reply to that is, that the goods would not have been sold to Mrs. *Barnes* except for the defendant's false representations. The evidence therefore is only used to rebut the *prima facie* case of title set up by the defendant.

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*Cur. adv. vult.*

Lord DENMAN C.J. on this day delivered the judgment of the Court:—

The question was, whether the representation made by the defendant's shopman fell within the provisions of the 9 Geo. 4, c. 14, requiring it to be in writing. On consideration of the case, we do not think that it involves any doubt as to law, but that it turns on the facts. The 6th section enacts that no action shall be brought whereby to charge any person upon or by reason of any representation relating to the character of another, and then comes that unhappily worded clause, "to the intent or purpose that such person may obtain credit, money or goods upon, unless such representation be made in writing." It is clear here that a representation as to the character of another has been made; but it is said by the plaintiff, that the representation set up is a mere medium of proving fraud in the defendant. But the only fact on which that appeared to rest is, the defendant having authorized the shopman to give the character he did of Mrs. *Barnes*. We therefore

(a) 3 Taunt. 274.



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think it falls within the first branch of the 6th section, and that the representation, not being in writing, was not admissible.

Rule discharged.

*Friday,*  
*June 9th.*

**The KING v. The Mayor, Aldermen and Town Councillors of WINCHESTER.**

The persons declared to be elected as town councillors by the mayor or ward alderman, at a municipal election, and who had accepted office and made the proper declaration, can only be removed from office by a quo warranto information, and therefore a mandamus does not lie to admit other candidates who had the majority of votes.

When, on a disputed municipal election, two of the candidates obtain a rule nisi for a mandamus to admit, and afterwards a rule nisi for a quo warranto against the parties admitted, the rule for the mandamus will not be, as a matter of course, discharged.

**THE** Attorney-General had obtained a rule nisi for a mandamus, calling upon the town council of Winchester to shew cause why they should not admit Messrs. *Earle* and *Dummer* to act and vote as members of the town council. The affidavits upon which the rule was obtained stated, that at the annual municipal election in 1836, there were two vacancies for councillors in St. John's Ward, occasioned by councillors going out by rotation, and another vacancy caused by the election of one of the councillors of the ward as alderman. There were five candidates for the three vacancies, Messrs. *Littlehales*, *Benny*, *Wells*, *Earle*, and *Dummer*. At the election of the 2d November, 1836, the alderman and assessors of the ward declared that the three first were duly elected. On the 5th November following, the assessors of St. John's Ward published a declaration to the effect, that the votes given for more than two candidates were improper votes, and that on calculating the votes given for two candidates only, they found that Messrs. *Earle* and *Dummer* had the majority, and the assessors declared them to be duly elected. Messrs. *Earle* and *Dummer* accepted the office, and duly made the declaration required by sect. 50 of 5 & 6 Will. 4, c. 76.

By the affidavits filed in answer, it appeared that *Littlehales*, *Benny*, and *Wells*, were declared, on the 2d of November, by the alderman of the ward, to be duly elected, and that on the 4th November following, *Littlehales* and *Wells* accepted the office of councillor, and made the declaration required by the 5 & 6 Will. 4, c. 76. *Benny* attended

on the following morning and did likewise; all three had attended and voted at subsequent meetings of the town council.

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Sir *W. W. Follett* (and *Crowder* was with him) now shewed cause, and submitted that as Sir *J. Campbell A. G.* had also obtained a rule nisi for a quo warranto against *Littlehales, Wells, and Benny*, for acting as town councilors, the rule for a mandamus to admit the other claimants must be discharged as a matter of course, otherwise he would be enabled to try two modes of establishing their right to the office: but, *per Curiam*, the rule on the mandamus must be first disposed of.

Sir *W. W. Follett*. The Attorney-General's course in obtaining a rule nisi for a quo warranto, shows that his first rule was erroneous, because it is evident that the offices are full, and therefore mandamus does not lie. Sect. 47, which directs how elections to extraordinary vacancies shall be carried on, may give rise to some doubt as to the time when they are to be filled up, but there can be none, that the elections of the three first candidates have been duly made. Sect. 35 directs that the mayor shall declare the result of the election; and sect. 44 gives this duty to aldermen, appointed by the mayor, when the borough is divided into wards. The three persons so declared to be elected have made the declaration required by the act, and have acted in the office. (He was then stopped by the Court.)

Sir *J. Campbell A. G.* and *Erle*, contra. *Earle* and *Dummer* were duly elected by the majority of good votes. [Lord *Denman C. J.* Assuming that to be so, how can you get over the difficulty of the office being full?] No doubt, if the three candidates had been duly admitted to the office under the old law, mandamus would not lie (*a*), but the old law, making admission necessary, has been repealed. A statutory declaration is now required; formerly oaths were

(a) See *Rex v. The Mayor of Colchester*, 2 T. R. 259.

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to be made, which might be administered by any two magistrates; and if that declaration be not made within five days, the party incurs a penalty, but making that declaration cannot be equivalent to an admission. Neither can acting in the office be equivalent, for all the parties who were candidates may have acted. Sect. 35 enacts, "that so many of such persons as shall have the greatest number of votes, shall be deemed to be elected;" it is clear that *Dummer* and *Earle* have the greatest number. That section cannot authorize the mayor or aldermen to declare any one of the candidates he chooses to be elected, even supposing the mayor to be constituted the returning officer by that section, which is not so clear.

LORD DENMAN C. J.—I find it stated in the affidavits, that at the election on the 2d November, the aldermen and assessors of the ward declared *Littlehales*, *Wells* and *Benny*, to be duly elected, and that every person so elected has accepted the office, and made the declaration required by the act. If then the office to which they have been elected is not full, I do not see how the office ever can be filled by an election. It seems to me that the construction pointed out is too absurd and too full of petty distinctions to have been contemplated by the legislature. The statute requires the mayor to declare the result of the election at the time, and not that the result so declared was to depend upon a further investigation of the legality of the votes given. There is therefore no ground for a mandamus to issue.

LITTTLEDALE J.—It seems to me that these offices were full. These parties have been declared duly elected, and have made the declaration required. It is true that under the old corporate system a formal admission was required, but that has been done away with by the late act, and the declaration has been substituted in its stead. After these persons had been thus elected, they would have been liable to a fine if they had not accepted the office, and then five

days is given them wherein to make the declaration, which is declared to be an acceptance of the office.

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PATTESON J.—I quite agree, and that on the full admission that the alderman of the ward had declared persons to be elected who had not the majority of votes. For sect. 35 says, the mayor and assessors shall examine the voting papers, and so many of such persons as shall have the greatest number of votes shall be deemed to be elected, and in case of an equality of votes, the mayor shall name the persons elected. Whoever is named by the mayor, therefore, must be deemed to be the person elected, and I must say that it is not the duty of the town council to allow persons who have not been declared elected by the mayor or aldermen, to make declarations, as if they had been elected councillors.

WILLIAMS J.—It is quite true, that within a given time after being elected, certain things are to be done, such as taking oaths, making a declaration, &c., and if those things are not done, penalties are incurred; but the argument on the other side would tend to shew that the result of the election cannot be declared at the time, and that it must all depend on a subsequent investigation. The only convenient course is the obvious one, that the parties declared by the mayor to be elected, must be deemed to fill the office until their title is invalidated.

Rule discharged, with costs (a).

(a) See *Rex v. The Mayor of Oxford*, 1 N. & P. 474; *Reg. v. The Mayor, &c. of Leeds*, post.

1837.

*Monday,  
June 12th.*

Where money belonging to the depositors in a Savings' Bank has been embezzled, the remedy of the depositors is not by action against the trustees and managers, but by mandamus, to compel them to appoint an arbitrator under s. 45 of 9 Geo. 4, c. 92.

**The KING v. The Trustees and Managers of the MILDENHALL SAVINGS' BANK.**

IN April, 1818, a Savings' Bank was established at Mildenhall, in Suffolk, under the provisions of the 57 Geo. 3, c. 130. Sir *Thomas Bunbury*, bart. and other individuals, were appointed trustees, and they were also appointed, in conjunction with several other persons, managers of the bank. By the rules for the management of the affairs, which were duly filed with the clerk of the peace, it was provided, that any matter in dispute between the said institution and any person acting under the same, and any depositor therein, and any executor, administrator, or next of kin of any deceased depositor, or any person claiming to be such executor, administrator, or next of kin, should be referred to the arbitration of two persons, one to be named by the claimant and the other by the managers; and in case the two persons so named should not agree, that they should forthwith nominate an umpire, and the decision and award of such referees and umpire should be final and binding upon both parties. One *Gill* was appointed clerk to the bank in 1818, and in 1825 he embezzled a large portion of the money deposited in the bank. The depositors claimed the money from the managers. It was agreed among the depositors that the claim of one person only should be prosecuted at a time. Accordingly, in 1832, an action was commenced in the Court of Common Pleas, by one of the depositors named *Crisp*, against Sir *Henry Edward Bunbury* and others, for money had and received. The Court of Common Pleas decided that the action was not maintainable (a), and that the remedy was by arbitration. In 1835, *Brett*, another depositor, claimed in his own right, and as executor of his father, about 360*l.*, and obtained a rule nisi for a mandamus requiring the trustees and managers of the bank to appoint an arbitrator. *Brett* had

(a) See *Crisp v. Bunbury*, 8 Bing. 394.

demanded the money due to him, and had appointed an arbitrator on his part.

*Biggs Andrews* (in Hilary term, 1836) (*a*) shewed cause against the rule. This application is made under the 9 Geo. 4, c. 92, s. 45, which enacts, "That if any dispute shall arise between such institution or any person acting under them, and any individual depositor therein, or any executor or administrator, or next of kin, or creditor of any deceased depositor, or any person claiming to be such, the matter so in dispute should be referred to the arbitration of two persons." That section is inapplicable to the present case. By the word "institution," is meant the body of the depositors, and not the trustees. This is evident from the 8th section, which provides "that the money of the institution shall be vested in the trustees for the benefit of the institution." The second section is still more explicit (*b*). The 45th clause was not meant to apply

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 The KING  
 v.  
 Trustees &c.  
 of the  
 MILDENHALL  
 SAVINGS'  
 BANK.

(*a*) Before Lord Denman C. J., Littledale J., and Williams J.

(*b*) It enacts, "That if any number of persons have formed, or shall form any society, in any part of England or Ireland, for the purpose of establishing and maintaining any institution, in the nature of a bank, to receive deposits of money for the benefit of the persons depositing the same to accumulate, the produce of so much thereof as shall not be required by the depositors, their executors or administrators, at compound interest, and to return the whole, or any part of such deposit, and the produce thereof, to the depositors, their executors or administrators, (deducting out of such produce so much as shall be required for the necessary expenses attending the management of such institution,) but deriving

no benefit whatsoever from any such deposit or the produce thereof, and shall be desirous of having the benefit of the provisions of this act, such persons shall cause the rules and regulations established, or to be established, for the management of such institution, to be entered, deposited and filed in manner hereinafter directed, and thereupon shall be deemed to be entitled to and shall have the benefit of the provisions contained in this act: Provided always, that the privilege of paying money into the Banks of England or Ireland, and of receiving receipts for the same, shall be, and the same is hereby declared to be extended to such institutions as may have formed, or may hereafter form their rules or regulations according to the provisions of this act;

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*The King*  
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*Trustees &c.*  
of the  
*MILDENHALL*  
*SAVINGS'*  
*BANK.*

to a case where the amount in dispute was so large. The whole provision shews that it was intended for cases of small importance, and not to a case where the whole fortune of a trustee may be at stake. It could not be the intention of the legislature to submit such a question to such a tribunal. The trustees cannot be said to be acting under the institution, because they were named before the institution had existence. The 45th section was only intended to apply to a case in which the trustees were to appoint an arbitrator for the institution. It was the opinion of a learned counsel(a), now on the bench, that the remedy of the parties was by action. In *Crisp v. Bunbury* (b), it was said, that the party's remedy was by arbitration, but the point now raised was not argued, and it was not necessary for the determination of the case to decide that the parties' remedy was by arbitration.

*Storks*, Serjt. and *Moody*, in support of the rule. All that the claimant asks is, to have the case put in the proper course of legal inquiry. The 45th section makes a distinction between the depositors and the institution, as it speaks of any individual depositor therein. That distinction was recognized in the cases of *The King v. The Trustees and Managers of the Witham Savings' Bank* (c), and *The King v. The Trustees and Managers of the Cheadle*

and it shall and may be lawful for the trustees of such institution respectively to invest any funds already accumulated by such institutions, and which shall have been invested at the time of the passing of this act, and to receive receipts for the same in manner authorized by this act: Provided, nevertheless, that no such institution to be hereafter formed shall have or be entitled to the benefits of the provisions in this act contained, unless the formation of the same shall have been sanctioned and approved

of by the justices of the county, riding, division, or place where such institution is intended to be held, at the general quarter sessions, and by the commissioners for the reduction of the national debt, or on their behalf by the comptroller-general, or assistant-comptroller, acting under the said commissioners."

(a) Mr. Baron *Parks*.

(b) 8 Bing. 394.

(c) 3 N. & M. 416; S. C. 1 A. & E. 321.

*Savings' Bank* (a). In *Ex parte Jones* (b) the trustees of a savings' bank were allowed to prove against the estate of the actuary, for the money which he had embezzled. It may be that the question will arise before the arbitrators, whether the trustees are personally liable: if so, the arbitrators may state the fact in the award, and the question may be discussed in this Court. It is not to be assumed that all the funds have been embezzled, but only a considerable portion of them. There may be sufficient to pay this claimant. [*Littledale J.* Must you not shew that there are funds? The act says, that the trustees shall not be liable, except for their own wilful neglect.]. That part of the act is prospective only. Supposing *some* funds to be left, the trustees are bound to distribute them proportionally. Even if the personal liability of the trustees is involved, it is a question for arbitration. *Crisp v. Bunbury* (c) is an express decision by the Court of Common Pleas upon the point, after time taken for consideration. It was there said, in the judgment, "It is evident, therefore, that the legislature contemplated the cheap, simple, speedy, and equitable adjustment of all disputes, by a reference in the mode pointed out in the act, instead of a more expensive, dilatory, and uncertain remedy by action at law; and we think we should defeat that very serviceable object—serviceable alike to the depositors and to the institution—unless we construe the words used, as words which import an obligation to refer, and which take away the right to sue in the superior Courts."

*Cur. adv. vult.*

Lord DENMAN C. J. on this day delivered the judgment of the Court.—This case was argued several terms ago, under very peculiar circumstances, which have led to much doubt and delay. It was a rule for a mandamus to the trustees of a savings' bank, to appoint an arbitrator for the

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 The KING  
 v.  
 Trustees &c.  
 of the  
 MILDENHALL  
 SAVINGS'  
 BANK.

(a) 3 N. & M. 418, n.; S. C.  
 1 A. & E. 323 n.

(b) 2 Mont. & Ayr. 193.  
 (c) 8 Bing. 394.



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 The KING  
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 of the  
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 BANK.

purpose of deciding a claim preferred against them by a depositor, who had sustained a loss by the default of one of the officers. A depositor in the same bank had brought an action against the same trustees for the consequences of the same default, which was tried some time ago in the Common Pleas, where, however, after argument, and time taken for consideration, that Court directed a nonsuit to be entered, on the ground that no action would lie, but that the remedy must be sought under the arbitration clause (a). The reasoning of the Court to this effect is strong, and we cannot say that they were mistaken, though a high legal authority, then at the bar, had given an opinion that the party ought to proceed by action.

This circumstance has induced us to pause upon the case; but we cannot see any ground for reversing the judgment of the Common Pleas on this point, which is, moreover, one of great practical importance to the whole body of depositors in savings' banks throughout the country, little able as they may be supposed to be to bear the expense of legal proceedings, and invited by the act to invest their property where it would be placed under a domestic jurisdiction.

Some doubts also occurred to us whether, under the ninth section of the 57 *Geo.* 3, the trustees could be personally liable to the depositors, and if not, whether we ought to order them to refer to arbitration a question which it would be illegal to decide against them. But we think that this consideration ought not to prevent our placing the claimant in the position which the act has provided for him. There may be particular facts in his case, which might prevent that clause from attaching, and the result may be, that the bank may be made liable, not the trustees personally.

The rule must be absolute.

Rule absolute.

(a) *Crisp v. Bunbury*, 8 Bing. 394.

1837.

BEVERLEY v. The LINCOLN GAS LIGHT and COKE  
COMPANY.

**ASSUMPSIT** for goods sold and delivered. Plea, non-assumpsit. At the trial before *Francis Maude*, Esq. assessor for the sheriff and county of York, in the West Riding of that county, it appeared that the plaintiff was a manufacturer of gas meters, and that the defendants had been incorporated by act of parliament. One of the committee for the management of the affairs of the defendants, in September, 1832, had ordered six meters, which were delivered to the Company, and their receipt acknowledged by the clerk of the Company in the following November. It appeared that the meters had been sent on an understanding, that if they did not answer they were to be taken back free of expense; one of the meters was seen in use in January, 1833, and on the 23rd April, 1833, they were returned as inadequate for the intended purpose. The plaintiff refused to receive them back, and brought the present action. Two objections were made on the part of the defendants; first, that the contract was executory only, and that consequently an action could not be supported for goods sold and delivered; secondly, that at all events assumpsit could not be maintained against the defendants, being a corporation. The learned assessor desired the jury to say whether they considered the meters had been returned by the defendants within a reasonable time. The jury were of opinion that the meters had been detained an unreasonable length of time. A verdict was then found for the plaintiff for 15*l.*, and leave was given to the defendants to move to set that verdict aside and to enter a nonsuit.

In Hilary term last *Peacock* obtained a rule nisi accordingly, against which

1. Where goods have been sold upon a contract of sale or return within a reasonable time, and the goods are detained an unreasonable time, the plaintiff may bring assumpsit for goods sold and delivered.

2. Assumpsit is maintainable against a corporation aggregate without a head on an executed parcel contract.

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BEVERLEY  
v.

The LINCOLN  
Gas Light  
and Coke  
Company.

First point:  
Indebitatus  
assumpsit lies  
upon a con-  
tract for sale  
or return,  
where the  
goods are not  
returned in  
a reasonable  
time.

Second point:  
Assumpsit lies  
against a cor-  
poration ag-  
gregate.

*Alexander*, in Hilary term, shewed cause (a). There can be no doubt that the declaration is good in point of form. *Bailey v. Gouldsmith* (b), *Swancott v. Westgarth* (c), *Harrison v. Allen* (d), and *Bianchi v. Nash* (e), establish the rule, that where goods are sold upon a contract of sale or return, if they are not returned within a reasonable time, the value may be recovered on a count for goods sold and delivered.

Then as to the second objection, that assumpsit cannot be maintained against a corporation. Undoubtedly the general rule is, that a corporation aggregate can do nothing but by deed under the common seal. But there are exceptions to this rule, for there are many acts of daily occurrence which may be done by a corporation without deed; the instances are collected in *Bacon's Abr.* title Corporations (f), *Comyns's Digest*, title Franchises (g), and *Viner's Abr.* title Corporations (h). For instance, a corporation aggregate is answerable for the acts of their servants, although those servants have not been appointed by deed under seal; *Smith v. The Birmingham and Staffordshire Gas Light Company* (i). A corporation aggregate may maintain assumpsit for use and occupation; *The Mayor and Burgesses of Stafford v. Till* (k), *The Mayor and Burgesses of Carmarthen v. Lewis* (l). In *The Dean and Chapter of Rochester v. Pierce* (m), a corporation was allowed to maintain debt on a simple contract for use and occupation. In *The East London Waterworks Company v. Bayley* (n), *Best C.J.* mentions the exceptions to the general rule, that a corporation aggregate cannot contract except by writing under the common seal of the body corporate; and states, as the second exception, where the acts done are of daily neces-

(a) Before *Patteson J.*, *Cole-  
ridge J.*, and *Williams J.*

(b) *Peake's N. P. C.* 56.

(c) 4 *East*, 75.

(d) 2 *Bingh.* 4.

(e) 1 *M. & W.* 545.

(f) (*E. 3.*)

(g) (*F 13.*)

(h) (*G. 2.*)

(i) 3 *N. & M.* 771; *S. C.* 1 *A. &  
E.* 526.


(k) 4 *Bingh.* 75.

(l) 6 *C. & P.* 608.

(m) 1 *Campb.* 466.

(n) 4 *Bingh.* 283, 287.

sity to the corporation, or too insignificant to be worth the trouble of affixing the common seal. This case is within that exception. In *The City of London Gas Light and Coke Company v. Nicholls(a)*, the Company were allowed to maintain assumpsit for gas supplied to the defendant. If a corporation can maintain assumpsit on an executed parol contract, it must follow, that on such a contract assumpsit is maintainable against them. It would appear from *Dunston v. The Imperial Gas Light Company(b)*, that there is a distinction between corporations established for the purpose of carrying on trade and manufactures and other corporations. This may be considered as a corporation established for the purposes of trade. This case is clearly distinguishable from *Broughton v. The Company and Proprietors of the Manchester and Salford Waterworks(c)*, in which it was held, that a corporation not established for trading purposes could not be acceptors of a bill of exchange payable at a less period than six months from the date, because such a case falls within the provision of the several acts passed for the protection of the Bank of England.

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*Peacock*, in support of the rule, admitted, that after the finding of the jury and the case of *Bianchi v. Nash(d)*, the first objection could not be supported. But the second objection is fatal. In *Bacon's Abr.* title Corporations(e), the general rule is laid down, "that aggregate corporations consisting of a constant succession of various persons, can do no act without a deed." In most aggregate corporations there is one integral part forming the head of the corporation, such as the mayor in a corporate town; in universities, the chancellor; in a corporation, consisting of the dean and chapter, the dean; in a corporation consisting of the master and fellows of a college, or of the master, wardens and

(a) 2 C. & P. 365.

(b) 3 B. & Ad. 125.

(c) 3 B. & Ald. 1.

(d) 1 M. & W. 545.

(e) (E. 3.)

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assistants of any of the companies in London—the master. But there may also be a corporation aggregate without a head. Thus, the collegiate church of Southwell, in Nottinghamshire, consists of prebendaries only without a dean; and the governors of the Charter House have no superior, but are all of equal authority<sup>(a)</sup>. In the present case the defendants are a corporation without a head, for the whole of the shareholders are incorporated, and all are of equal authority.

A distinction has been taken between those corporations which have, and those which have not, a head. In the former the head of the corporation may command a thing in person, or do small acts, such as hiring a servant, without deed. But a corporation aggregate which has no head, must give their authority under the seal of the corporation.

The same distinction may perhaps be made with respect to purchasing certain things for the use of the corporation; and indeed it seems, that if the head of a corporation, by the intervention of a servant, buy goods for the use of the corporation, *which are actually applied* to their use, they are bound by the contract, and an action may be maintained against them, though the contract be not under seal.

So if one who is the regular servant of the corporation buy goods for the use of the corporation, and actually apply them to their use, the corporation, it seems, are bound; but in either of these cases the plaintiff must aver that the things came to the use of the corporation. The present corporation not having a head, could not appoint a servant, or make a contract for sale or return, without writing under seal. If they are liable to pay for the goods on the ground that they were ordered for them, and actually came to their use, it does not follow that they are liable in *assumpsit*. The liability arises not by contract, but from

(a) See the case of *Sutton's* and *Comyns' Dig.* tit. Corporation, Hospital, 10 Rep. 30 b; Bac. (F13.)  
 Abr. tit. Corporation (K.) pl. 39,


the fact of their using the goods. If the law under the circumstances impose a liability on the corporation to pay for the goods which were actually used by them, this liability might create a debt. But the law cannot imply a promise, inasmuch as such a corporation is incapable of making a promise<sup>(a)</sup> in fact; and nothing can be suffered by law which cannot exist in fact. In the case of a servant hired by the head of a corporation, the corporate body may be liable to pay him his wages; the law may say that they are indebted to him in the amount, and that they may be sued in debt; but as a corporation cannot make a promise in fact, the law cannot imply a promise to pay the debt due for wages. An action of debt therefore is the proper remedy in these cases, and not *assumpsit*. In the case of an incorporated railroad company, the corporation may be liable for the loss of parcels, or for any negligence which may occasion an injury to a passenger, although there may have been no express contract entered into with them. But the remedy would be an action on the case, founded on the duty implied by law, and the law could not imply a promise against them to perform the duty arising from a particular state of facts, as they might in the case of a private individual carrying on business as a carrier or coach proprietor; and consequently the party injured in such a case would not have his election to sue either in case or *assumpsit*, as he would against a private individual. So here the plaintiff's remedy would be by an action of debt only, although, if the defendants had not been incorporated, he might have elected to bring either debt or *assumpsit*; and the reason in both cases is the same, viz. that a corporation cannot in point of fact make a promise, and consequently that the law cannot, under a particular state of facts, raise a promise<sup>(b)</sup> against them by implication, to perform that obligation which the law casts upon them. The extent of their liability will be the same in either form of action, and the only distinction is in

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the form of the remedy. It was laid down in *Sir G. Frevill v. Ewebancke* (a), that a dean and chapter could not be sued upon a promise, for they cannot act without deed. It has not been decided in any case that a corporation can be sued in assumpsit on an executed contract. In all the cases which have been cited, in which the action was in assumpsit, the corporation were the plaintiffs. In *The East London Waterworks Company v. Bailey* (b), it was laid down, that as the corporation would not be liable in assumpsit, that therefore the defendant would not. In *The Dean and Chapter of Rochester v. Pierce* (c), the corporation were the plaintiffs. A corporation may receive a promise, although they cannot make one without deed. In *The Mayor and Burgesses of Stafford v. Till* (d), the corporation were plaintiffs; also in *The City of London Gas-light and Coke Company v. Nicholls* (e), the corporation were the plaintiffs. In *Tilson v. The Warwick Gas-light Company* (f) the declaration was in debt; and Bayley J. there said, that upon general demurrer it must be taken that the contract was by deed. In *Dunston v. The Imperial Gas-light Company* (g), the action was also in debt. *Murray v. The East India Company* (h) is distinguishable from the present case, because the act of parliament gave an authority to accept bills of exchange, which was in fact a declaration by the legislature that an action of assumpsit might be maintained against them. In *Broughton v. The Manchester Waterworks Company* (i), it was held, that assumpsit was not maintainable against the defendants as acceptors of bills of exchange; because the act of parliament which incorporated the company, gave them authority to accept bills. In *Slark v. The Highgate Archway Company* (k), where the action was in assumpsit on a pro-

(a) 1 Roll. 82.

(b) 4 Bing. 283.

(c) 1 Campb. 466.

(d) 4 Bingh. 75.

(e) 2 C. & P. 365.

(f) 7 D. & R. 376; S. C. 4 B. & C. 962.

(g) 3 B. & Ad. 125.


(h) 5 B. & Ald. 204.

(i) 3 B. & Ald. 1.

(k) 5 Taun. 792.

missory note, the [company were authorized by statute to give promissory notes, and consequently to make a promise.

*Cur. adv. vult.*

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PATTESON J., in the course of this term, delivered the judgment of the Court. After stating the facts, his lordship continued thus :—


In this case two objections were insisted on : first, that the action was misconceived in form, for that the contract was executory only ; second, that at all events assumpsit could not be maintained against the defendants, being a corporation aggregate without a head.

As to the first, the jury found at the trial that the time of return was unreasonable. Upon the argument in support of this ground of nonsuit, it was not denied that if the action had been between two individuals upon this finding of the jury, the form of action would have been sustainable. For this the cases of *Bailey v. Gouldsmith* (a) and *Bianchi v. Nash* (b) are certainly sufficient authorities. But it was said that those decisions were inapplicable to the case of a corporation, because that could not, at all events, enter into a parol contract for the delivery of goods on sale or return. It seems to us that this distinction cannot be maintained, even if the facts were sufficient to raise it ; for the principle on which the cases cited above and others have been decided, as to the proper form of declaring where the original contract has been executory, but the period of credit has expired or condition has been performed, is not that the law alters the mode of declaring on the original contract, and states it not according to the fact, but that it conclusively infers that simple contract to pay the price for goods sold and delivered, which would arise upon the facts of a sale and delivery, without any special circumstances accompanying them. He who seeks to dis-

(a) Peake's N. P. C. 56.

(b) 1 Mee. & Wels. 545.



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turb that inference must not content himself with merely shewing conditions or other special provisions, forming part of the contract at the time of its being entered into; he must shew them in existence and operation at the time of action brought: if not, they may be struck out of consideration, and the contract treated as originally simple, unconditional and executed. Now this reasoning will apply equally to a corporation and an individual; and we must now take it that the goods were sold unconditionally, have been delivered, and are in the possession and use of the corporation.

This therefore brings us to the second question, which is, whether an action of assumpsit can be maintained against a corporation aggregate without a head, on an executed parol contract. It is well known that the ancient rule of the common law, that a corporation aggregate could speak and act only by its common seal, has been almost entirely superseded in practice by the Courts of the United States in America (a). The decisions of those Courts, although intrinsically entitled to the highest respect, cannot be cited as direct authority for our proceedings; and there are obvious circumstances which justify their advancing with a somewhat freer step to the discussion of ancient rules of our common law, than would be proper for ourselves. It should be stated, however, that in coming to the decision alluded to, those Courts have considered themselves not as altering the law, but as justified by the progress of previous decisions in this country and in America. We, on our part, disclaim entirely the right or the wish to innovate on the law upon any ground of inconvenience, however strongly made out; but when we have to deal with a rule established in a state of society very different from the present, at a time when corporations were comparatively few in number, and upon which it was very early found necessary to engraft many exceptions, we think we are justified in treating it with some degree of strictness, and are

(a) 2 Kent's Comm. p. 288.

called upon not to recede from the principle of any relaxation in it which we find to have been established by previous decisions. If that principle, in fair reasoning, leads to a relaxation of the rule, for which no prior decision can be found expressly in point, the mere circumstance of novelty ought not to deter us; for it is the principle of every case which is to be regarded, and a sound decision is authority for all the legitimate consequences which it involves.

Several cases have determined that corporations aggregate may maintain actions on executed parol contracts. In *The Dean and Chapter of Rochester v. Pierce* (a) Lord Ellenborough, first at nisi prius, and in this Court afterwards, held that they might sue in debt for use and occupation of their lands; and the Court of Common Pleas, in *The Mayor and Burgesses of Stafford v. Till* (b), held the same as to assumpsit. This establishes that where a benefit has been enjoyed, such as the occupation of their lands by their permission, the law will imply a promise to make them compensation, which promise they are capable of accepting, and upon which they may maintain an action. The action for use and occupation is established by the 11 Geo. 2, c. 19, s. 14, and, according to the words of the statute, may be maintained "wherever the agreement is not by deed." Some agreement seems to be implied as the foundation, though it is well established that it need not amount to a formal demise, or even be express. To hold then that a corporation is within this statute, is to hold that it may be a party to an agreement not under seal, at least for the purpose of suing on it, and it would be rather strong to deny at the same time that it could be a party to it for the purpose of being sued on it. Lord Ellenborough indeed says, in *The Dean and Chapter of Rochester v. Pierce* (a), that the action for use and occupation does not necessarily suppose any demise; "it is enough that the defendant


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(b) 4 Bing. 75.

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used and occupied the premises by the permission of the plaintiff, and a corporation, as well as an individual, may grant such permission without deed." But, call it by whatever name we please, permission or demise, it clearly binds the corporation; the party occupying and paying rent under it acquires rights from the corporation, becomes their tenant from year to year, and can be ejected only by the same means as would be available for an individual landlord. Here then the law implies that the corporation has acted as a contracting party, and that too in a contract, to the validity of which, for the purposes of this action, *the absence of any deed is essential*. If in that case an express agreement, not under seal, had been tendered in evidence to prove the terms on which the defendant held, it must have been received; and if on the face of it it had appeared that the plaintiffs had come under any conditions precedent to the recovery of rent on their part, such conditions would surely have been binding on them, though not under seal, and the non-performance of them would have been an answer to the action. In *The Southwark Bridge Company v. Sills and others (a)*, the contract for letting was proved by a series of letters. We agree that the relation between the corporation and the occupier of its land may commence without express contract,—that it may in the first instance appear to want many of the legal incidents of the relation between landlord and tenant; but add the fact of payment of rent for one year, and acceptance by the corporation, and you add nothing of express contract on the part of the corporation; it has apparently done no more than acquiesce in the receipt of a certain compensation for the occupation of its land for a year; and yet, by the addition of that fact, the corporation and the occupier are demonstrated to be landlord and tenant. This appears to us to shew that in the eye of the law the relation between them commenced in contract, though it wanted at first the evidence from which it might be inferred.


(a) 2 C. & P. 371.

But, if this be a contract to which a corporation may be a party, though not under seal, and any rights resulting from that agreement come to be enforced, may not that form of action be applied which is appropriate to parol agreements? Is it not unreasonable to hold, that a corporation may make a binding promise, and yet that assumpsit shall not be maintainable against it, if the promise be broken?


If, then, it be established, that, upon the same contract, the remedies are mutual; that, if the corporation may sue its tenant in assumpsit on a parol demise, the tenant may, in turn, sue it in the same form of action, we do not see how it can be denied that a corporation, occupying land, may be sued in assumpsit generally.

We may suppose two contracts entered into at the same moment, in writings, not under seal; by the one, a corporation, professes to demise its land to *A. B.*; by the other, *A. B.* demises his land to the corporation, and enjoyment of the premises is had under both; it would be surely an unsatisfactory state of the law which should compel us to hold, that if the corporation sued *A. B.* in assumpsit for his rent, *A. B.* might not set off, or sue in the same form, for that which was due from the corporation.

We have been thus minute in examining the case of use and occupation, because it appears to us very fairly to open the principle on which this matter ought to stand. The same point has been ruled in an action for goods sold and delivered. *The City of London Gas-light and Coke Company v. Nicholls and another (a)*, was assumpsit for gas supplied; the objection was taken, that the contract was not under seal; *Best C. J.*, overruled it at once, saying, "it was quite absurd to say, that there was any necessity for a contract by deed in such a case." If, in that case, a set-off had been pleaded for meters supplied to the company, could evidence in support of it have been rejected, because there was no contract under seal for the supply? Yet, if

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(a) 2 C. & P. 363.

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it could not, upon what principle can it be maintained, that that supply might not have been made the ground of an action of indebitatus assumpsit.

We have not overlooked the technical difficulty which has been alleged upon the form of the declaration, in which a mere promise is stated. Part of our argument has already been addressed to meet it; it seems to us that it rests on no solid foundation. When the question is, whether a particular party can sue or be sued by a particular writ or count, or be counted against in any particular form, the true answer is to be found by putting another question, can he enter into the contract, or bring himself or be brought within the special circumstances which form essential parts of the statement in such writ or count? That this is the principle may be seen conclusively in the history of our forms of action, ancient and modern, given in the third volume of *Blackstone's Commentaries*. If, therefore, it be asked, whether a corporation can be sued in assumpsit, we ask in return, can it bind itself by a parol contract, can it make a promise?—if it can, the former question must be answered in the affirmative.

We therefore agree with the Court of Common Pleas, in *The Mayor of Stafford v. Till* (a), that there is no substantial difference in this respect between assumpsit and debt. Every count, indeed, in debt for goods sold and delivered, charges a contract; the words "sold and delivered," says *Buller J.*, in *Emery v. Fell* (b), "imply a contract, for there cannot be a sale unless two parties agree." *De Grave and another v. The Mayor and Corporation of Monmouth* (c), was debt against a corporation for the price of weights and measures. It was contended that the action could not be maintained, as a corporation cannot contract, unless by some instrument under the common seal. The delivery had been proved—an examination of the goods at a full meeting of the corporation, and subsequent use of

(a) 4 Bing. 75.

(c) 4 C. & P. 111.

(b) 2 T. R. 30.

them; the order for them was by the mayor *de facto*, who was afterwards ousted. Lord *Tenterden* thought the examination was the exercise of an act of ownership, "*and that, by so doing, the corporation had recognized the contract.*" The verdict passed for the plaintiffs, and was not disturbed. The recognition of a contract is its adoption—the taking it to be the contract of the party so recognizing it; but that assumes it to be a contract which the party was capable of entering into. Lord *Tenterden*, therefore, must have considered the corporation as capable of contracting for the purchase of goods without a deed; and in *Dunston v. The Imperial Gas-light Company* (a), where the plaintiff failed on another ground, he carefully guards himself from being supposed to decide the contrary.

We certainly have not found any decided case, in which it has been held that a corporation may be sued in assumpsit, on an executed parol contract, a circumstance of great, but not conclusive weight. For, not to mention that there is no case in which the contrary has been expressly decided upon argument, if it be remembered what the course of the law has been on this subject, we shall find that circumstance not unnatural, and that some deduction must be made from the weight of dicta unfavourable to our present view, which may be found here and there in the books upon this subject. At first the rule appears to have been exclusive, as, indeed, its principle required it to be. A corporation, it was said, being merely a body politic, invisible, subsisting only by supposition of law, could only act or speak by its common seal; the common seal, in the words of *Peere Williams*, in *Rex v. Bigg* (b), was the hand and mouth of the corporation. The rule, therefore, stood not upon policy, but on necessity, and was, of course, equally applicable to small as to great matters, to acts of daily or of rare occurrence, to what regarded personal as well as real property. But this, though true in theory, was intolerable in practice; the very act of affixing the seal, of

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(a) 3 B. &amp; Ad. 125.

(b) 3 P. Wms. 423.

The first of these is the fact that the  
 Government has been unable to secure  
 the necessary funds to carry out its  
 policy of non-interference. This is  
 due to the fact that the Government  
 has been unable to secure the necessary  
 funds to carry out its policy of non-  
 interference. This is due to the fact  
 that the Government has been unable  
 to secure the necessary funds to carry  
 out its policy of non-interference.

that they might have been sued in debt for goods sold and delivered ; for the reasons given we think they are equally liable in assumpsit, and, consequently, this rule will be discharged.

Rule discharged.

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MORTON v. BURN and another.

Thursday,  
May 25th.

**ASSUMPSIT.** The declaration stated, that whereas before the commencement of this suit, and before and at the time of making the promise hereinafter mentioned, to wit, on &c., the defendants were indebted to the plaintiff in the sum of 728*l.* 2*s.* 6*d.*, under and by virtue of a certain bond, dated the 14th day of July, 1832, and a certain indenture or deed of assignment thereof, dated 19th October, 1833 : and whereas also, according to the condition of the said bond, the sum of 228*l.* 2*s.* 6*d.*, part of the said sum of 728*l.* 2*s.* 6*d.*, ought to have been paid on the 1st day of February then last past, and thereupon, in consideration of the premises, and also in consideration that the plaintiff would accept and receive payment of the said sums of money on the days and times hereinafter mentioned, and that in the meantime the plaintiff would give time to the defendants for payment thereof, the defendants undertook and promised the plaintiff that the whole of the sum of 228*l.* 2*s.* 6*d.*, with interest thereon from the 1st of February then last, should be paid to the plaintiff on or before the 1st of June then next, or in default thereof, that they said defendants would sign a warrant of attorney to enable the plaintiff to enter up judgment against them forthwith for the same, and that they would pay to the plaintiff the sum of 50*l.* quarterly, on the 1st day of September, the 1st day of December, the 1st day of March, and the 1st day of June in every year, until the further sum of 500*l.* residue of the sum of 728*l.* 2*s.* 6*d.*, together with interest thereon, at the rate of 5*l.* per cent. per annum, from the first day of February then last, should be fully paid and satisfied ; and in default of paying any of the said last-mentioned instal-

1. Forbearance to sue, on the part of the assignee of a bond, is a good consideration for a parol promise by the obligor to pay by instalments, and to give a warrant of attorney to enter up judgment for the whole in case of default in payment of any instalment.

2. The mutuality of this contract consists in the forbearance by the assignee being a condition precedent to any right to sue on the promise.

3. The bond is in no respect varied by the parol agreement, as it was already forfeited at the time of making the new contract.



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ments, they, the defendants, would execute a warrant of attorney to enable the plaintiff forthwith to enter up judgment against the defendants for the whole sum of 500*l.* and interest, or so much thereof as might then remain due: and the plaintiff avers, that he did forbear and give time to the defendants for the payment of the said sum of 728*l.* 2*s.* 6*d.* and interest, until and upon the respective days and times mentioned for payment thereof in the said promise and undertaking of the defendants; and although the defendants paid to the plaintiff the sum of 226*l.* 2*s.* 6*d.*, and interest thereon, yet the defendants did not nor would pay to the plaintiff 50*l.* quarterly, on the days and times abovementioned in that behalf, but therein wholly made default, and a large sum of money of the said instalments, to wit, the sum of 250*l.* being for the five sums of 50*l.* each, which respectively became due on &c., now is wholly due in arrear and unpaid from the defendants to the plaintiff; and although the said defendants made default in payment of the respective sums on the days and times aforesaid, contrary to the tenor and effect of the said promise of the defendants; yet the defendants did not nor would execute a warrant of attorney to enable the plaintiff forthwith to enter up judgment against the defendants for so much of the said sum of 500*l.* and interest as then remained due, but to do this the defendants have, and each of them hath wholly refused.

At the trial of this cause before *Coleridge J.*, at the sittings in Middlesex after last Michaelmas term, the verdict passed for the plaintiff with 559*l.* damages, and speedy execution was awarded by the learned judge under the 1 *W. 4. c. 7, s. 2.*

In the ensuing Hilary term, *Edwards* obtained a rule *nisi* to set aside the execution had under the 1 *Will. 4, c. 7*, and to enter judgment for the defendants *non obstante verdicto*, on the ground that the declaration disclosed no sufficient consideration, and he cited *Mowse v. Edney* (a), *Potter v. Turnor* (b), and *Anon.* (c).

(a) 1 *Rol. Abr.* 20, pl. 12.

(c) *Cowp.* 128.

(b) *Winch*, 7; *S. C. Palmer*, 185.

*Cresswell* and *W. H. Watson* now shewed cause (a). Two objections were made to the plaintiff's claim at the trial, first, that the action should have been on the bond; second, that there was no consideration for the promise. The first proposition cannot be maintained. In *Com. Dig.* Action upon the Case upon Assumpsit, Consideration (B 1), it is laid down, "that a promise in consideration of the forbearance of a suit against an executor or administrator for the debt of the testator," is good. [*Patteson J.* That would be in an action against the executor in his individual capacity.] Yes, but it shews that assumpsit would lie, although the original debt due to the testator was a bond debt. Another case of good consideration, cited by *Com. ubi sup.* from 1 *Roll. Abr.* 20, l. 15, (b) is quite in point with the present case. "So, in consideration of forbearance, by the assignee of a bond, if he has a letter of attorney to sue and release." This last case disposes also of the second objection, that there was no consideration for the promise. It is clear that the forbearance to sue by the assignee of a bond, is a good consideration for a promise, and although, in the case in *Rolle*, a letter of attorney is mentioned, and it may be contended, that it does not appear here that the plaintiff had such an authority, there is no doubt now that the assignee of a bond may sue for it in law, in the name of the obligee (c); and so much is this right recognized by the Courts of Law, that even if the obligee has given a release, the obligor cannot set it up in an action brought against him by the assignee of the bond (d). The cases on this subject are collected in the notes to *Forth v. Stanton* (e), where the position is laid down broadly, that the assignee of a chose in action may sue in equity, and therefore that a promise to pay the debt in consideration of forbearance, is founded on a good con-

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First point:  
Assumpsit lies  
on a promise  
to pay a bond  
debt, in con-  
sideration of  
forbearance.

Second point:  
Forbearance  
to sue by the  
assignee of a  
bond, is a good  
consideration.

(a) Before Lord Denman C. J.,  
*Littledale* and *Patteson Js.* *Wil-*  
*liams J.* was in the Bail Court.

(b) Erroneously cited in *Comyn*,  
for l. 11, *Pitt v. Bridgwater*.

(c) See *Delaney v. Stoddart*, 1  
T. R. 22.

(d) See *Legh v. Legh*, 1 B. &  
P. 447.

(e) 1 Wms. Saund. 210.

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deration, on the authority of *Reynolds v. Prosser* (a), *Oble v. Dittlesfield* (b); and the contrary decision of *Potter v. Turnor* (c) is stated to be contradicted by all the other authorities. The declaration here states that the defendants were *indebted* to the plaintiff by virtue of the bond and the deed of assignment, and that in consideration that the plaintiff would give time to the defendant, the defendant promised &c.; after verdict it must be intended, that it was a legal debt which the defendant owed, and therefore the consideration is perfectly good. But if it should be held, that there appears on the record to be an assignment of a mere chose in action; for the reasons above stated, the forbearance to sue for it in equity is a good consideration. *Morse v. Edney* (d) was cited in moving for the rule. In that case *A.* was indebted to *B.* on a bond, and *B.*, being indebted to *C.*, assigned to him *A.*'s bond; and it was held, that although *A.* promised *C.* to pay, if he would give him a week for payment, there was no consideration for the promise, as *A.* was still liable on the bond to *B.*; but it does not appear in that case, that the forbearance by *C.* extended beyond the time at which the money on the bond became payable. If the time for payment were extended, it appears by the subsequent case of *Wilmott v. Prigget* (e), that the consideration is a good one. *Russel v. Haddock* (f), and the other cases cited by Serjt. *Williams* (g), confirm this position, and shew that when a chose in action is assigned, with a power to sue at law or in equity, the remedy of the assignor is suspended.

*Edwards* contra. A consideration to be good must be good at the time the agreement is made, out of which it arises; *Cooke v. Oxley* (h), *Head v. Diggon* (i), *Lees v. Whitcomb* (k). The consideration relied on in this case was, the giving of time. At the time of the agreement,

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|--------------------------------|------------------------|
| (a) Hard. 71.                  | (f) 1 Lev. 188.        |
| (b) 1 Vent. 153; 1 Rol. Abr.   | (g) 1 Wms. Saund. 210. |
| 29, l. 60.                     | (h) 3 T. R. 653.       |
| (c) Winch. 7; S. C. Palm. 185. | (i) 3 M. & R. 97.      |
| (d) 1 Rol. Abr. 20. pl. 12.    | (k) 5 Bing. 34.        |
| (e) 1 Rol. Abr. 29, pl. 60.    |                        |

the plaintiff had two remedies against the defendant, viz. a suit in equity in his own name and right, and an action at law in the name of the obligee of the bond. The agreement could not operate on the plaintiff's right to sue in equity, the promise on the part of the defendant to pay the plaintiff the money, being only that which in equity he was before compelled to do; *Stilk v. Myrick* (a), *Harris v. Watson* (b); and consequently would raise no consideration to support the promise on the part of the plaintiff to give the time. Nor could it operate on his right to sue at law, since as he would sue in the name of the obligee, it would be an agreement by a party not upon the record.

II. The agreement in question being by parol, is void, as it varies the terms of an instrument under seal. If it were held to be good to vary the time of payment, then it might vary the terms altogether, and operate as a release, which it clearly could not do. Therefore, the agreement being invalid, the consideration fails. Again, a person who gives time for the payment of a debt, must give the time in reference to a good cause of action, either at law or in equity: it is clear that the plaintiff had no right of action at law, and he did not by this agreement prevent himself from suing in equity. Lastly, the declaration does not state any consideration at all; for, although it avers that the plaintiff did forbear and give time, it is quite consistent with this declaration, that the plaintiff refused to make any such promise, he therefore might have brought his action immediately after the defendant had entered into the agreement. There was no mutuality therefore in the contract, which renders it void; *East London Waterworks v. Bailey* (c). The cases of *Mowse v. Edney* (d) and *Potter v. Turnor* (e), cannot be distinguished from the present case. It is true *Potter v. Turnor* (e) may perhaps be considered as overruled by *Fenner v. Meares* (f), but the principle of the former case is distinctly upheld by *Johnson v. Collings* (g) and

(a) 2 Camp. 317.

(b) Peake's N. P. C. 72.

(c) 4 Bingham. 283.

(d) 1 Rol. Abr. 20, pl. 12.

(e) Winch, 7; S. C. Palm. 185.

(f) 2 W. Bl. 1269.

(g) 1 East, 98.

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*Williams v. Everett (a)*, in which case *Fenner v. Meares (b)* was disapproved of by Lord *Kenyon* and Lord *Ellenborough*. Another view may be taken of the case, namely, that if the consideration be held to be good, the plaintiff would have two causes of action, one on the agreement, and another on the bond; and if he recovered on the agreement, and afterwards sued the defendant on the bond, it perhaps may be out of the defendant's power to shew that it was in respect of the same bond that the agreement was made.

*Cur. adv. vult.*

LORD DENMAN C. J., on a subsequent day in this term, delivered the judgment of the Court:—This was a motion in arrest of judgment. The question is, whether forbearance for a given time, on the part of the assignee of a bond, to sue the obligors, is a good consideration for a promise by the obligors to pay the assignee at the expiration of that time, or give him a warrant of attorney for the amount.

It was objected that there is no mutuality in the agreement, for that if the plaintiff had sued the defendants in the obligee's name, the promise to forbear would be no answer. Again, that this is a mere nudum pactum, being only a promise to do that which the defendants were already bound to do by their bond. And further, that if this promise be binding, it amounts to varying a deed by parol contract, which is contrary to the rule of law.

We do not think any of these objections sufficient to arrest the judgment.

As to the first, there is sufficient mutuality, for although the agreement to forbear would not be pleadable to an action in the name of the obligee, yet, unless the plaintiff did forbear, according to his agreement, he would not be able to sue on the defendant's promise, he is obliged to aver, as he does in the present declaration, that he has forbore, which is a condition precedent to his suing.

As to the second objection, this is not a mere nudum pactum, for the defendants promise to pay the plaintiff, a

(a) 14 East, 582.

(b) 2 W. Bl. 1269.

third person, whom they were not bound to pay by their bond, and they promise in consideration of a detriment sustained by the plaintiff, at their request, namely, a forbearance to enforce his right in the name of the obligee.

As to the third objection, the bond is in no respect varied by this agreement; the new contract entered into by the defendants with the plaintiff leaves the bond just as it was before: it was forfeited before the agreement, and so it remains, and the agreement would be no answer to an action on it.

The cases on this subject are collected in Mr. Serjeant Williams's notes to *Forth v. Stanton* (a) and to *Barber v. Fox* (b), to which may be added *Yard v. Eland* (c), and other cases collected in *Com. Dig. Action on the Case sur Assumpsit, Consideration* (B.)

They are all in favour of the action lying, with the exception of *Potter v. Turnor* (d), which we think inconsistent, not only with the current of authorities, but with established principles. For these reasons we are of opinion, that the rule to arrest the judgment in this case must be discharged.

Rule discharged.

- (a) 1 Wms. Saund. 210, n.(1). (d) Winch, 7; S. C. Palm. Rep.  
 (b) 2 Wms. Saund. 137, n. (2). 185.  
 (c) 1 Lord Raym. 368.

#### GRUGEON v. SMITH (a).

INDORSEE against the drawer of a bill of exchange, accepted by *John Jones*, payable in London three months after date. The declaration averred presentment to the acceptor and refusal to pay, and notice to the defendant.

(a) This case was decided in *Emmerson v. Saltmarsh*, decided in this term, will be published with the cases of Michaelmas term.

The following is a sufficient notice of dishonour to the drawer of a bill of exchange, "Your bill, drawn on T. T., and accepted by him, is this

day returned with charges, to which we request your immediate attention."

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Plea, that the defendant had not due notice. At the trial of this cause, which was in the Common Pleas at Lancaster, before *Patteson J.*, at the last spring assizes at Liverpool, it appeared that the action was brought by the plaintiff as Manager of the Liverpool Branch of the Commercial Bank of Manchester, and that upon the bill being returned, he gave the usual notice of dishonour, by filling up the following printed form :

COMMERCIAL BANK OF ENGLAND, MANCHESTER.

Sir,

BILL £ \_\_\_\_\_ due \_\_\_\_\_ on

drawn by \_\_\_\_\_ is this day  
 returned \_\_\_\_\_ with charges \_\_\_\_\_  
 to which your immediate attention is requested.

I am, Sir,  
 Your obedient servant,  
 Manager.

It was contended for the defendant, on the authority of *Solarte v. Palmer (a)*, that this was not a sufficient notice of dishonour. The learned judge ruled that it was, and the verdict passed for the plaintiff.

*Murphy*, in the following term, moved for a rule nisi to enter a nonsuit. *Solarte v. Palmer (a)* has settled the law that a notice of dishonour, like that sent in this case, is not sufficient. The advantage of that decision is to keep the mercantile world to a due observance of forms. If the Court relaxes the rule, new questions will arise upon every imperfectly worded notice (c).


Lord DENMAN C. J.—In *Solarte v. Palmer (a)* an in-

(a) 1 Bing. N. C. 191.

(b) April 19th, before Lord Denman C.J., *Littledale, Patteson*, and *Coleridge Js.*

(c) He also moved upon the fact of the notice reaching the defendant.

ference might fairly have been drawn that no presentment to the acceptor had been in fact made. It is impossible to do so here.

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LITLEDALE J. concurred.

PATTERSON J.—*Solarte v. Palmer* (a) is a very different case. The notice there contained nothing relating to dishonour by the acceptor; whereas here there is express notice that the bill is returned ——— with charges, and it is impossible to doubt that that is a statement of its having been returned dishonoured.

COLERIDGE J. concurred.

Rule refused (b).

(a) 1 Bing. N. C. 194.

N. C. 688; *Hedger v. Stevenson*,

(b) See *Boulton v. Welsh*, 3 Bing.

2 M. & W. 799.

### CASE IN THE EXCHEQUER CHAMBER.

WRIGHT v. DOE, on the demise of TATHAM.

Tuesday,  
 June 13th.

**EJECTMENT** for the manors of Hornby and Tatham, with the advowsons, tithes, messuages, &c., in the county of Lancaster. The lessor of the plaintiff, *Admiral Tatham*, claimed as heir at law of *John Marsden, Esq.*; the defendant, who had been his steward, claimed as devisee in trust under a will. The will was sought to be set aside on the ground that the testator's seals were broken, in a cupboard under his bookcase, in a private room, together with other letters, indorsed by the testator, and to some of which answers had been written by him, are not admissible in evidence; per *Tindal C. J.*, *Parke B.*, *Bosanquet J.* and *Coltman J.*, as there was nothing to shew any knowledge or act of the testator, with regard to them; dissentientibus, *Park J.* and *Gurney B.*

2. A letter addressed to the testator, requesting him to communicate on a matter of business with his attorney, and found with the other letters, indorsed by the attorney, who lived some miles off, is admissible in evidence, as it shews an act done upon it by the testator; per *Tindal C. J.*, *Park J.* and *Gurney B.*; dissentientibus, *Parke B.*, *Bosanquet J.* and *Coltman J.*



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ground of alleged incapacity in the testator to make a will. At the first trial of the ejectment, before *Gurney B.*, at the Lancashire assizes, 1833, amongst other evidence tendered to prove the capacity of the testator, a number of letters, written to the testator by individuals of character and distinction on business and other matters, was tendered and rejected; a bill of exceptions was tendered to this ruling, but judgment on the bill of exceptions was delivered on another ground (a). At the second trial, before *Gurney B.*, at the Lancashire summer assizes, 1834, the learned baron admitted the letters, subject to further consideration, on the ground of the difference of opinion among the judges on the subject. A bill of exceptions was tendered, and upon the argument in this Court, in Hilary term, 1836, it was decided that the letters in question were inadmissible. (b)

On the third trial of the ejectment, before *Parke B.*, at the Lancashire summer assizes, 1836, the three letters hereinafter mentioned were tendered in evidence, and rejected, by the learned baron. A bill of exceptions was tendered, and judgment being signed in the Court of Queen's Bench, the case now came on for argument in the Exchequer Chamber.

The bill of exceptions stated, that "after the death of *John Marsden*, many letters, addressed to him by various persons, were found, with other papers, in a cupboard under his bookcase, in his private room, and that to many of these letters, letters had been written and sent in answer, which last-mentioned letters were proved to be in the handwriting of and signed by the said *John Marsden*; and that upon some others of them so found, there were indorsements in the handwriting of the said *John Marsden*, and which letters, so answered and indorsed, were tendered and received in evidence upon the said matter in controversy and at issue." Amongst these letters there was the following, addressed to the testator, by one *Charles Tatham*, the brother of the

(a) See *Wright v. Doe d. Tatham*, 3 N. & M. 268.

(b) *Doe d. Tatham v. Wright*, 6 N. & M. 132.

lessor of the plaintiff, and a cousin of the testator, who was at that time in America. The following is a copy:

“ Alexandria, 12th October, 1784.

“ My dear Cousin—You should have been the first person in the world I would have wrote too hadn't my time been employed by affairs that called for my more imeadeate attention; in the first place I am call'd upon by my buseness, it being the first consideration must by no means be neglected. As for my Brother his goodness is such that I know he will excuse me till I am more disengaged: was I to write to him in my present embarased situation I perhaps might only do justice to my own feelings and he might construe it deceit, so different an oppinion have I of him to mankind in gen<sup>l</sup>. who above all things are fond of flattery. I shall now proceed to give you a small idea of what has pass'd since my departure from Whitehaven, as I suppose *Harry* long e're now has told you the rest. We sail'd the 14<sup>th</sup> July & had good weather the chief of the way, but as you know nothing of Sea faring matters it is not worth while to dwell upon the subject. We reached the Cape of Virginia the 13<sup>th</sup> Sept<sup>r</sup>, but did not get heare till the beginning of the present month, so we were about twenty day in coming 350 miles. When I arrived I was no little consirned to find the Town in a most shocking condition, the people dieing from 5 to 10 p<sup>r</sup> day, & scarsely a single house in Town cleare of descease, which proves to be the putrid feavour. I am going to Philadelphia in a few days if God spares my life & permits me my health, & their I intend to stay till affairs here bare a more frendly aspect; & so the next time you here from me will be I expect from that place, tho' you'l please to direct to me heare as usual. God bless you, my dear Cousin; and may you still be bless'd with health, which is one of greatest blessings we require hear, is the sinseare wish of, D<sup>r</sup> Cos<sup>n</sup>, your Affect: Kinsman & verry Humble Serv<sup>t</sup>, *Chas Tatham.*”

“ P. S. Pray give my kind love to my Aunt, my Brother & my Cousin Betty; also my Compliments to all the rest

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Oct. 12, 1784.

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of the Family & all others my former acquaintances &c.  
 Alexandria 12<sup>th</sup> Oct<sup>r</sup> 1784."

And the counsel for the said defendant further proved, that the said letter was marked with the London post-mark, as a ship letter, and was in the handwriting of the said *Charles Tatham*, and addressed to the said *John Marsden*, Esq., Wennington Hall, where the said *John Marsden* then resided; and it was also proved that the said *Charles Tatham* was personally acquainted with the said *John Marsden*, and had been dead many years. And amongst the said papers of the said *John Marsden*, there was found the following draft or copy of a letter from the said *John Marsden* to the said *Charles Tatham*, in the handwriting of the said *John Marsden*.

*J. Marsden's*  
 letter, June 1,  
 1787.

" Dear cousin,—I received your letter some time ago, wherein you mentioned that you had sent me a map of the United States of America, to the care of Mr. *George Welsh*, merchant, in Liverpool. I deferred writing till such times as I had made inquiry after it, but did not get the map till the 7th instant. You mentioned in your letter that you had sent me a small quantity of dried fruit; I received nothing but the map, for which I am obliged to you. My aunt has had very poor health since you left England, she has scarce ever been well; I am in hopes she is getting better again; I think that change of air and a journey would be of service to her. We have lately had an account of poor Mrs. *Smith's* death; she died at St. Alban's, the 7th instant. My aunt has had a letter from your brother *Harry*, he is very well. It is reported that your acquaintance, Mr. *John Bradshaw*, is going to be married to a Miss *Fell*, of Lancaster; whether there is any truth in it or not, I cannot tell. I suppose you have received my last letter, wherein you will see an account of your nurse's death. I have nothing further to add but compliments from my aunt and your cousin *Betty*.

I remain, dear cousin, your affectionate kinsman,

*J. Marsden."*

" Wennington Hall, June 1, 1787.

*C. Tatham, Esq."*

Which draft or copy of such letter, from the said *John Marsden* to the said *Charles Tatham*, was produced and read in evidence, on the part of the said defendant.

Amongst the letters so found, there was one addressed to *John Marsden*, at Wennington, where he then resided, from one *Oliver Marton*, which was open, with the seal broken, of which the following is a copy:

“Dear sir,—I beg that you will order your attorney to wait on Mr. *Atkinson* or Mr. *Watkinson*, and propose some terms of agreement between you and the parish or township, or disagreeable things must unavoidably happen. I recommend that a case should be settled by your and their advice, and laid before counsel, to whose opinion both sides should submit, otherwise it will be attended with much trouble and expense to both parties.—I am, sir, with compliments to Mrs. *Cookson*, your humble servant, &c.

*Oliver Marton.*”

“I beg the favour of an answer to this.”

“May the 20th, 1786.”

Mr. *Oliver Marton* was, at the date of the above letter, vicar of Lancaster, which was about 11 miles distant from the then residence of the said *John Marsden*; he was acquainted with him, and had been dead upwards of 30 years, (at the trial,) and the letter was in his handwriting. The counsel for the defendant further proved, that one *James Barrow* was, at the time of the date of the said letter, the attorney of *John Marsden*, and had been dead upwards of 35 years, and that an indorsement on the back of the said letter, of these words, “20th May, 1786, Letter from Mr. *Marton* to Mr. *Marsden*,” was in the handwriting of the said *James Barrow*.

Another letter from the Rev. Mr. *Ellershaw*, was also found in the same place, after Mr. *Marsden*'s death, open and with the seal broken, of which the following is a copy:

“Dear sir,—I should ill discharge the obligation I feel myself under, if in relinquishing Hornby, I did not offer

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ton's letter,  
May 20, 1786.

Rev. Mr. El-  
lershaw's let-  
ter, May 20,  
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you my most grateful acknowledgements for the abundant favours of your hospitality and beneficence. Gratitude is all that I am able to give you, and I am happily confident that it is all that you expect. I have only therefore to assure you, that no circumstances in this world will ever obliterate from my heart and soul the remembrance of your benevolent politeness. May the good Almighty long bless you with health and happiness, and when his providence shall terminate your Christian warfare upon earth, may the angels of the Lord welcome you into blessedness everlasting. It will afford me pleasure to continue my services during the vacancy, if agreeable to you.—With every sentiment of respect and affection to yourself, and the worthy family at the castle, I hope you will ever find me your grateful, faithful and obliged servant. *Henry Ellershaw.*"

"Please deliver the inclosed to Mr. Wright."

"Chapel le Dale, 3d Oct. 1789."

Mr. *Ellershaw* had been for several years the curate of the chapelry of Hornby, to which he had been appointed by Mr. *Marsden*, as patron of the chapelry, and he was well acquainted with the said *John Marsden*, and he also had been dead some years at the time. The letter was written by him in the presence of the Rev. *John Gurnell*, when Mr. *Ellershaw* was about relinquishing the said preferment.

These three letters were respectively tendered in evidence, and rejected by the learned baron, whereupon a bill of exceptions was tendered.

Another point was raised in the bill of exceptions as to the secondary evidence received, of the execution of the will, which was discussed on a former occasion, by the Court of Exchequer Chamber (a).

This case was argued in the vacation after Hilary term, 1836, (Feb. 6,) before *Tindal C. J.*, *Park J.*, *Parke B.*, *Gaselee J.*, *Bosanquet, J.*, and *Gurney B.*, by Sir *F. Pollock* for the plaintiff in error, and by *Cresswell* for the

(a) See *Wright v. Doe d. Tatham*, 3 N. & M. 263.

defendant in error (a); it was again argued in the vacation after Easter term, 1836, (May 7,) before *Tindal C. J.*, *Park J.*, *Parke B.*, *Bosanquet J.*, *Gurney B.*, and *Coltman J.*, by *Sir F. Pollock* for the plaintiff in error, and *Starkie* for the defendant in error (a). In Trinity vacation, (June 13,) judgment was pronounced *seriatim*.

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**COLTMAN J.**—Upon the trial of this case exceptions were taken to the ruling of the judge, both on the part of the lessor of the plaintiff and on the part of the defendant. It is unnecessary to say anything upon the subject of the exceptions taken on behalf of the lessor of the plaintiff. The objections taken on behalf of the defendant relate to the admissibility in evidence of three letters, addressed to the testator by persons now deceased, well acquainted with him during their lives.

Before examining the particular circumstances of the case, in reference to the letters severally, it seems to me desirable to consider the more general question, whether on an issue as to competency like the present, letters written by third persons to the party whose competency is in dispute, are admissible in evidence, though never received by the person to whom they are addressed.

It may be urged, in support of their admissibility, that competency or incompetency is a matter of opinion, and that such letters are evidence of the opinion entertained by the writers, or, at any rate, that the writing of them is an act done, and that where an act done is accompanied by a declaration of opinion, or, as it was expressed in the course of the argument, where a declaration of opinion is embodied in an act done, it is admissible in evidence. Now, admitting that this is a question of opinion and judgment, we may ask how is matter of opinion required by the law of England to be proved? The general rule is, that it is to be proved by the examination of witnesses upon oath.

(a) The principal arguments judgments of the Court, it has been urged by counsel appearing in the thought unnecessary to give them.

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The administering of an oath furnishes some guarantee for the sincerity of the opinion, and the power of cross-examination gives an opportunity of testing the foundation and the value of it. Such being the general rule, it is necessary for the party who brings forward evidence not on oath, to shew some recognized exception to the general rule within which it falls.

“The true line (says Mr. Justice *Buller*, in *Rex v. Eriwell* (a),) for courts of justice to adhere to is, that wherever evidence not on oath has been repeatedly received and sanctioned by judicial determinations, it should be allowed; but beyond that, the rule that no evidence shall be admitted but what is on oath shall be observed.” It was admitted in the argument, that our law books furnish no instance of such evidence having been received; an admission of itself, according to Mr. Justice *Buller*, sufficient to cause it to be rejected. It may be urged, that evidence of opinion is admitted in some cases without oath, as, for instance, where reputation is given in evidence to prove a public right. It is a sufficient answer to say, that those cases belong to a recognized class, forming an admitted exception to the general rule, and are limited and guarded by various restrictions. The evidence under consideration does not fall within the principle on which the exception is founded, and it is excluded by the restrictions which limit the exception. The principle on which I conceive the exception to rest is this;—that the reputation can hardly exist without the concurrence of many parties interested to investigate the subject; and such concurrence is presumptive evidence of the existence of an asserted right, of which, in most cases, direct proof can no longer be given, and ought not to be expected; a restriction now generally admitted as limiting the exception is this, that the right claimed must be of a public nature, affecting a considerable number of persons. In the question under consideration, the point

(a) 3 T. R. 719.

in issue is capable of direct proof in the widest sense, and it is strictly a question of a private nature.

If such letters are admissible simply upon the score of their being evidence of the opinion of the writers, I can see no reason why their verbal declarations should not be so, or their letters to a third party. It is no answer to say that they are excluded as being *res inter alios actæ*, for the same objection would apply in all cases where reputation and the declarations of deceased persons are given in evidence.

But it is contended, that the writing of a letter is an act done, and that the contents of the letter are a declaration accompanying the act; and that an opinion, (though not evidence *per se*.) is yet evidence when embodied in an act. Now it appears to me, that if the letter is admissible on this ground, it must be either because the act is evidence by itself, or because the opinion is evidence. Where an act done is evidence *per se*, a declaration accompanying that act may well be evidence if it reflect light upon or qualifies the act. But I am not aware of any case where the act done is, in its own nature, irrelevant to the issue, and where the declaration *per se* is inadmissible, in which it has been held that the union of the two has rendered them admissible. Now, to see whether the act of writing one of the letters in question is admissible, nakedly, and *per se*, we must strip the case of all other circumstances, and suppose the simple fact proved, that *I. S.*, being a stranger to *Mr. Marsden*, wrote a letter to him, and put it into the post-office—that the letter was there destroyed, and that its contents are unknown. *I. S.* being a stranger to *Mr. Marsden*, and, for anything that appeared, quite ignorant of the state of his mental capacity, I would ask whether the writing of a letter under these circumstances would be evidence? Surely not; it would be a fact simply irrelevant and inadmissible on that ground. It seems to follow, that the sending of a letter is not evidence, except on the ground that it contains a declaration of opinion, for

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if you strike out (as in the case just supposed) everything which contains any indication of opinion, the fact is merely irrelevant. You have, then, a fact which is irrelevant, and an opinion which is inadmissible: how can the union of the two furnish competent evidence for the determination of the point in issue, which neither of them, separately, has any legal tendency to prove?

If the view I have taken of this case be so far correct, the result is, that, in the case I have been considering, letters are not evidence unless received by the party to whom they are written; nor could the bare receipt of them make any difference, unless they were in some way acted upon. But it cannot be doubted that any act done by the testator, with reference to them, would be evidence, for it is difficult to say that any act of his is irrelevant to the issue; and such act may make the letter with which it is connected admissible, as explaining the nature of the act done, and indicating the extent of his capacity. The question, therefore, comes to this;—is there evidence sufficient to shew that the testator had done any act with respect to these letters? If there is, they ought, as it seems to me, to have been admitted in evidence; if not, they were properly rejected. I will consider first the letter which stands first in order in the bill of exceptions. This letter is addressed to Mr. *Marsden* by his kinsman, *Charles Tatham*, and is dated October 12, 1784. It should be considered with reference to the letter of Mr. *Marsden* to the same *Charles Tatham*, dated June 1, 1787. The letter last mentioned contains no reference to that of October 12, 1784, but as it does advert to a letter received by the writer from *Charles Tatham*, and to another letter written by Mr. *Marsden* to *Charles Tatham*, it furnishes ground for inferring that a correspondence was carried on between them. It may be said, that the mere fact of a correspondence being carried on by Mr. *Marsden* is some evidence of capacity, and that each link in the chain is relevant to the question at issue, as tending to prove the fact that a correspondence

was carried on; but, on consideration, it seems to me that the mere fact of a correspondence being carried on, abstracted from all proof of the nature of it, is not evidence.

The term *correspondence* involves in it the idea of some sequence and connexion of ideas, and cannot strictly be applied to a set of letters without a tacit reference to their nature and contents. We must, therefore, look at the contents of the letters. Those written by Mr. *Marsden* may be good substantive evidence, but those written to him stand on a different footing. They may be admissible by way of explaining such of Mr. *Marsden's* letters as refer to them, or are written in answer to them; but when they are wholly isolated and independent, and where nothing is done upon them, they can only be considered as declarations of opinion, and as such they are, in my judgment, inadmissible.

The question, then, upon this letter of October the 12th, 1784, is reduced to this;—whether there is any proof of an act done by Mr. *Marsden* in reference to it? The case shews that it was found after his death in a cupboard under his bookcase, in his private room, amongst other letters, some of which were indorsed in his hand-writing, and to others of which answers had been sent, also in his hand-writing. The act he had done is the opening of the letter and the placing it in a proper place of deposit. The expression “after his death,” is somewhat vague, but taking it to mean immediately after his death, we have here an act done by some one, and the question is, by whom it must be inferred to have been done? If Mr. *Marsden* is considered as a person of competent understanding, the natural inference would be, that he did it: if he is not so considered, no such inference arises. Now, his competency being the matter in issue, no assumption must be made either way. Now on whom does the burden of proof lie? Obviously upon the party contending for the admissibility

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of the evidence ; he must shew an act done by Mr. *Marsden*. It is not enough for him to say no inference can be drawn either way ; he must prove affirmatively that an inference arises from the facts found, that Mr. *Marsden* did the act ; but the inference does not arise unless Mr. *Marsden* is assumed to be competent. It seems to me, therefore, that the letter now in question was inadmissible.

With respect to the letter of Mr. *Marton*, the case stands more favorably for the defendant than in the case of the letter last considered, in this respect, that the acts done in reference to it are stronger, if shewn to be done by Mr. *Marsden* ; but there is in this case also, the same deficiency of proof that the acts done were done by Mr. *Marsden*. It seems to me, therefore, that this letter, and that the third letter also, is inadmissible on the ground above explained. The result is, that in my opinion, the judgment of the court below should be affirmed.

GURNEY B.—The history of this cause is extraordinary, and certainly not satisfactory. It came on first in the shape of an issue of *devisavit vel non*, at the Lent assizes, 1830. On that trial, the letters to which there were no answers, and on which there were no indorsements, were tendered and rejected, and a verdict found establishing the will : the execution of the will being proved by Mr. *Bleasdale*, one of the attesting witnesses. Application was made to the Lord Chancellor for a new trial, which application was dismissed. The heir at law brought an ejectment, which was tried at the Lent assizes at Lancaster, 1833 ; upon that trial two questions arose :—

First, the admissibility of letters, which were, upon the authority of the former decision, rejected. The other, whether the will could be read without producing the surviving attesting witness, Mr. *Bleasdale* being dead. The defendant contended that he was entitled to read the will upon the evidence of the verdict on the former trial. He

gave in evidence, also, the testimony of Mr. *Bleasdale* upon the former trial, but did not contend for the admissibility of the will in evidence upon that ground. It was ruled that the will could not be read. Upon these two matters a bill of exceptions was tendered.

When the bill of exceptions came on to be heard in this Court, before seven judges, they were unanimously of opinion that the will was receivable in evidence, not upon the ground which had been contended at the trial, of the former verdict, but upon the evidence of Mr. *Bleasdale*, given at the first trial, which, being proved, was the same as if he had been living. But upon the question respecting the letters, the judges being divided in opinion, four for receiving and three for rejecting them, no judgment was given.

At the summer assizes of 1834, the cause again came on to be tried. Upon the production of those letters an objection was taken *pro forma* without any argument, and the letters were received. Upon a motion for a new trial, the Court of King's Bench were of opinion that the letters ought not to have been received in evidence, and a new trial was granted, which came on at the last Summer assizes, and on that trial those letters were offered in evidence, and conformably with the decision of the Court of King's Bench, were rejected, upon which this bill of exceptions was tendered.

Thus the *venire de novo* was granted upon a point which the judges had never been called upon to decide, and the new trial was granted upon a point which was decided in conformity with the opinion of the majority of this Court; and this bill is tendered upon the decision founded on the authority of the Court of King's Bench.

It is stated in the bill of exceptions, that the matter in controversy was, whether Mr. *Marsden*, from his attaining to competent age in the year 1779, and down to the time of his making the will and codicil in the years 1822 and 1825, was a person of sane mind and memory, and capable of

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making a will. And to maintain the affirmative of the matter in controversy, these letters were tendered in evidence. The facts are thus stated.

“ That after the death of Mr. *Marsden*, many letters, addressed to him by various persons, were found, with other papers, in a cupboard under his bookcase in his private room, and that to many of those letters, letters had been written and sent in answer, which last-mentioned letters were proved to be in the hand-writing of, and signed by him, *John Marsden*, and that on some others of the letters so found there were endorsements in the hand-writing of the said *John Marsden*, and which letters, so answered and endorsed, were tendered and received in evidence upon the said matter in controversy.”

It appears, therefore, that Mr. *Marsden* had a private room, and in a cupboard under the bookcase in that room, were found letters of various descriptions—some, to which he had given answers, and the letters and answers were read in evidence;—some which he had endorsed, these too were read in evidence,—and the three letters in question, upon which there were no indorsements written by him.

Upon the trial which underwent the review of the Court of King’s Bench, the letters that were offered in evidence were many in number. Upon the trial which is now under the consideration of this Court, the letters tendered are reduced to these three. One of these letters was written in the year 1799 by the Reverend *Henry Ellershaw*, who had been for many years perpetual curate of Hornby, Mr. *Marsden’s* parish, to which curacy he had been presented by Mr. *Marsden*, and it was written upon the occasion of his relinquishing that preferment, and written in the presence of his curate. The second, by *Charles Tatham*, the brother of the lessor of the plaintiff, on his arrival in America. The third by the Rev. *Oliver Marton*, vicar of Lancaster. The two latter of these letters were not, when under the consideration of the Court of King’s Bench,

'accompanied by those circumstances which now distinguish them from the rest.

All the transactions of this gentleman's life were subjected to the view and consideration of the jury to enable them to form their judgment of the competency or incompetency of his mind; all that he said, and all that he did, and all that he omitted to say and to do. It appears to me that the ransacking this, which I think must be taken to be his depository of papers and letters, affords no insignificant means of judging of his competency. If the letters had been found with the seals unbroken, that might have afforded evidence of a total want of curiosity, if not of imbecility of mind; the finding them with the seals broken is, I think, *prima facie* evidence that they had been opened and read by him to whom they were addressed, and in whose repository they were found.

It is said that this supposition is founded on a presumption of competency, which is the question to be tried. When it is stated that these unindorsed and unanswered letters were found in company with some letters which were indorsed by Mr. *Marsden*, and with others which were answered by him, and the letters in his own hand produced and read, I do not see that it is forming any presumption of his competency, to assume that the seals had been broken and the letters read by him. It appears to me that it is only from a presumption of his incompetency that any other inference is to be drawn.

The question is not, what is the weight of the evidence when received; the question is not, whether any suspicious circumstances may or may not attach to it; all that is matter of observation to the jury. If any facts could be introduced to raise a suspicion that these letters were foisted into this place by any other person than Mr. *Marsden*, they would doubtless have their effect where they ought to have it, but nothing of that sort is stated. The letters bear every mark of genuineness; they were written at periods very remote, when no question of the competency of

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this gentleman had arisen. They were written by persons well acquainted with him, and these persons were dead long before this question arose. I think, therefore, that the contents of this repository are evidence; evidence of more or less value, according as they are fairly or unfairly laid before the jury; evidence of no importance, or even affording just grounds for suspicion, and for adverse presumption, if garbled.

It is said, who knows that these letters were deposited in this cupboard by Mr. *Marsden*? I think that the company in which they were found, is *prima facie* evidence that they were deposited by him; they were found in the same place with the letters which he had indorsed, and the letters he had answered. It is matter of inquiry for the jury, whether any other person was likely to have deposited them there; whether any other person used or sat in that room; whether the letters produced were all the letters that were found, or whether they were garbled.

On an indictment for high treason, letters with the seals broken, found in the possession of the person indicted, are evidence against him, although there be no indorsement of his, and no letter of his in answer, because the presumption is, that the seals having been broken, he has read them, and that having read them, he has preserved them; so here, I think that the finding them raises the same presumption, and that it is not a sufficient answer that this is a question of competency.

Upon the other two letters the argument for their reception is much stronger.

First, the letter of *Charles Tatham*. It appears, that in 1784, *Charles Tatham* went to America, and on his arrival he wrote this letter to Mr. *Marsden*, which bears the mark of a ship-letter, and has the post-mark. If nothing more appeared, it would stand upon the same footing as the letter of Mr. *Ellershaw*; but, further, there was found among the said papers of Mr. *Marsden*, a draft of a letter from Mr. *Marsden* himself to *Charles Tatham*, dated in June, 1787, which

proves that these parties had been from the year 1784 till that time, in a course of correspondence, for he says,—“ I received your letter some time ago, wherein you mention that you have sent me a map of the United States of America. I deferred writing till such time as I had made inquiry after it, but did not get the map till the 7th instant. You mention in your letter, that you had sent me a small parcel of dried fruit ; I received nothing but the map, for which I am obliged to you,” &c. “ I suppose you have received my last letter, wherein you will see an account of your nurse’s death.”

It is objected that this draft of a letter does not make the letter of 1784 evidence, because it is not an answer to that specific letter. I cannot see the difference between a letter which acknowledges another of a series of correspondence, and a letter which acknowledges the letter in question. If it had acknowledged both together, that, it is admitted, would have made it evidence. If the draft had been, “ My dear cousin, I have received your letter of the 12th of October, 1784,” and nothing more, that would have made it evidence ; but his answering another letter of the series, commenting upon the terms of that letter, acknowledging the receipt of one thing, and noticing the non-receipt of another, which ought to have accompanied it, &c. &c., that does not make it evidence, because it refers to a later letter of the series. The distinction appears to me to be too refined.

Lastly, there is the letter of the Rev. *Oliver Marton*, the vicar of Lancaster, the county town, a few miles from which *Mr. Marsden* lived, written to him on business, requiring professional assistance, requesting that *Mr. Marsden* will order his attorney to wait on one of two gentlemen who are named, to propose terms of agreement between himself and the parish, recommending that a case be settled by the two attorneys, and laid before counsel. This letter, written fifty-one years ago, by a gentleman intimately acquainted with *Mr. Marsden*, is found to have been in the

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hands of Mr. *Barrow*, the attorney of Mr. *Marsden*, who has been dead thirty-five years, and there is an indorsement on the back of the letter in the hand-writing of Mr. *Barrow*, "20th May, 1786, Letter from Mr. *Marton* to Mr. *Marsden*." It is objected, that this letter is not evidence because it is not proved, first, that the letter was received by Mr. *Marsden*; secondly, that it was by him shewn to Mr. *Barrow*; thirdly, how it came back into the hands of Mr. *Marsden*; and fourthly, when Mr. *Barrow* made that indorsement.

I think that these observations are applicable only to the effect of the evidence when produced, not to its production; they are to be addressed to the jury. To require such proof of events that occurred half a century ago, is to require impossibilities; the only persons who could have given it have been long in their graves. The legitimate inferences to be drawn from this letter thus indorsed are, that the letter was received by Mr. *Marsden*; that he did, either personally or by letter, consult Mr. *Barrow* upon the subject, and that Mr. *Barrow* had the letter under his consideration, and probably returned it to him with the advice that he thought proper to give upon it. That is the natural and ordinary course of things, and I do not think that we are called upon to presume every thing that is forced and unnatural, to exclude evidence from the consideration of the jury.

BOSANQUET J.—The subject now under discussion was brought before the Court upon a former occasion, together with another question which forms the second part of the bill of exceptions in the present case. Upon that latter question the Court was unanimous, and a *venire de novo* was awarded; but I am not aware that any decided opinion was expressed or entertained by a majority or any particular number of judges who then constituted the Court. For myself I can say that I had come to no distinct conclusion upon the subject, but as the judges

upon discussion among themselves, did not appear likely to come to an unanimous judgment respecting the admissibility of the letters, the decision of the Court was pronounced upon the second question only. I must, therefore consider the first question in this case as if it had never been raised in this Court before.

Upon the bill of exceptions it is stated that the matter in controversy between the parties at the trial was, whether or not the testator was, and had been from his attaining to competent age in 1779, and to the time of his making his will and codicil in 1822 and 1825, a person of sane mind and memory, and capable of making a will. In support of the affirmative, three letters were tendered in evidence, on which the following questions arise :—

First.—Whether letters addressed to the testator by persons well acquainted with him, and since deceased, which letters were found among the testator's papers after his death, but do not appear to have been recognized in any way by the testator, are admissible in proof of his capacity.

Secondly.—If not admissible without some recognition of them by the testator, whether any one of the letters set forth on the record is shewn to have been recognized by the testator.

First.—The letters cannot be admissible unless they are relevant to the matter in issue, which matter is the capacity of the testator. The contents of the letters have no direct relation to the testator's state of mind, but may be taken to shew the opinion of the writers that the person addressed was of competent understanding. If the writers of these letters were produced as witnesses and examined upon oath, their opinions would be receivable in evidence, because the grounds of their knowledge and the credibility of their testimony might be ascertained by cross-examination.

But I know of no rule by which the opinion, however clearly expressed, of a person however well informed, is receivable in evidence, unless it be given in the course of legal examination. No precedent has been referred to in

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which such evidence has been admitted upon a trial at law. The extensive and dangerous consequences of allowing such evidence are too obvious to require observation. In all cases where the judgment of third persons upon any matter in issue is receivable, personal examination upon oath is required. Indeed, it has not been contended that mere matter of opinion, though given by a deceased person, ought to be received. But it is said that letters addressed to the testator are not to be considered as containing matter of opinion only, but that they are acts done. Undoubtedly they are acts done by the *writers*, but they are not acts done to the testator. It is said that they are evidence of the manner in which the testator has been treated. If, by "treatment" of the testator, is only meant the manner in which certain persons of his acquaintance acted in respect of him, I am of opinion that their treatment affords no test of the testator's capacity. If the treatment affect the testator himself, as where language of insult, contempt, or ridicule is employed in his presence, his own conduct and deportment consequent upon such treatment, afford evidence from which the condition of his mind may be inferred. But I can see no sound distinction between letters written by one relation of a testator to another, and letters addressed to himself, unless the latter be received by the testator, in which case the relevancy of the evidence consists, not in the contents of the letters, but in the testator's conduct in respect of them. Unless the testator be made party to the act by his privity to it, the act shews nothing but the opinion of the agent.

The authority of cases in the Ecclesiastical Courts has been relied on, in which courts letters, under the circumstances now objected to, have been received in evidence, and several cases have been referred to; *Buttin v. Barry*, 16th Jan. 1834, cited arguendo (a); *Wheeler and Bortsford v. Alderson* (b); *Waters v. Howlett* (c); and two others not

(a) 1 A. & E. 8.

(b) 3 Hag. Ecc. R. 609.

(c) 3 Hag. Ecc. R. 790.

reported, *Morgan v. Boys*, and *Harvey v. Jones*, Dec. 1836. In neither of the two first of these cases was the point decided. In the first, the memorial written for the testator is stated to have been adopted by him as well as found among his papers. In the second, the judge certainly refers to a letter written by the father of the testatrix, to a person who paid his addresses to her, though she was not shewn to have been privy to such letter. But the propriety of admitting such letter was not made a point in the cause. In the third case we are informed, though it does not appear in the printed report, that a letter written to the testatrix by her brother, from France, not referring to any other letter and not replied to, was received by the judge (*Sir John Nicholl*) after objection made; and *Sir Herbert Jenner* is stated to have decided the same thing in the two last cases, notwithstanding the judgment of the Court of King's Bench (*a*) was cited; saying that such evidence had always been received. It is not the province of this Court to consider whether such evidence is properly receivable in the Ecclesiastical Courts. Those courts are constituted upon principles very different from those which regulate the courts of common law. Where the judge is authorized to deal both with the facts and the law, a much larger discretion with respect to the reception of evidence may not unreasonably be allowed than in the courts of common law, where the evidence, if received by the judge, must necessarily be submitted entire to the jury. By the rules of evidence established in the courts of law, circumstances of great moral weight are often excluded, from which much assistance might in particular cases be afforded in coming to a just conclusion, but which are nevertheless withheld from the consideration of the jury upon general principles, lest they should produce an undue influence upon the minds of persons unaccustomed to consider the limitations and restriction which legal views upon the sub-

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ject would impose. This is matter of daily experience, and requires no illustration by examples.

I do not think, therefore, that the practice of the Ecclesiastical Courts ought to govern our decision; and I can find no principle in the law of evidence recognized either by text writers, or by the courts of common law under which the evidence stated in the first question can be ranged. Where the capacity of a person is not the matter in controversy, his knowledge of letters and of other things found in a place accessible to him in his own house or apartments, may sometimes be presumed, such as writings connected with the charge, upon a charge of treason; notes or other documents forged or partly forged, upon a charge of forgery; instruments of coining or housebreaking, upon charges of coining or burglary (*a*). But where capacity itself is the only object of inquiry to which the proof is directed, knowledge cannot be presumed for the purpose of proving capacity. I am therefore of opinion that letters addressed to the testator by persons well acquainted with him and since deceased, and which letters were found among the testator's papers after his death, unless recognized by the testator himself, are not admissible in evidence to prove his capacity.

Secondly.—The three letters tendered in proof of the testator's capacity, are stated to have been found after the testator's death open and with the seals broken in a cupboard under a bookcase in the testator's private apartment, among other letters, some of which had been answered, and others indorsed by him. If I am correct in holding that the relevancy of these letters depends upon the testator's conduct with respect to them, his conduct is a matter of fact to be proved by the party who seeks to use the letters. If the testator is shewn to have dealt with the letters as a sensible man would deal with them, his doing so will afford evidence of his capacity. But until it appears that

(*a*) See 3 Stark. Ev. 801, and notes.

he has acted personally in the matter, there is nothing from which any inference as to his state of mind can be drawn. Capacity or incapacity to make a will is the matter to be ascertained. In other words, the question is whether he has been in a condition to manage his own concerns, or whether his condition has been such that they must necessarily have been managed for him by others? Such being the real question to be tried, no presumption is to be made that any act bearing upon it was either done by the testator or by any other person for him; since the whole value of the act as evidence of the testator's mind depends upon the part which the testator himself has taken in it. The letters may have been opened, arranged and deposited in the cupboard by the testator himself, or by his steward, attorney or other agent. The facts are perfectly consistent with either view of the case, and the latter may have been the case without any imputation of fraud. There is nothing in the record to shew that the place where the letters were found was not accessible to others as well as to the testator himself, even in the testator's lifetime; and it does not appear at what period, or by whom, or under what circumstances they were found in the cupboard after his death. It might be the proper place for the deposit of the testator's letters. But the mere fact of the letters being found there, affords no evidence personally applicable to the testator, unless it be established that he placed them there himself.

It has been urged that these letters were found among others answered and indorsed by the testator himself. Those letters were properly received in evidence, because the testator himself was shewn by legitimate evidence to have acted upon them. But his having acted upon those letters, affords no evidence that he had placed among them the letters not acted upon. Indeed, if the admissibility of the letters indorsed or answered to prove the testator's state of mind had depended upon their having been deposited personally by the testator in the particular place in which they were found, I am not prepared to say that the testator's

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personal act in placing them there could be inferred from his previous recognition by indorsing and answering them.

It has been further argued that the privity of the testator to all the three letters in question appears upon distinct grounds applicable to each. The letter written by *Charles Tatham* is contended to be receivable as part of a correspondence between himself and the testator. The letter in question is dated Alexandria, 20th October, 1784. It does not refer to any letter received from the testator, nor does it appear to have been answered by the testator. But a draft of a letter in the testator's hand to *Charles Tatham*, dated the 1st of June, 1787, was produced and received in evidence, which draft acknowledges the receipt of a letter some time ago from *Charles Tatham*, in which he mentioned having sent to the testator a map of the United States of America, and some dried fruit, but in which he makes no allusion whatever to any of the matters contained in the letter of the 20th of October, 1784. This draft, therefore, cannot be used as a recognition of the letter of *Charles Tatham*, written three years before, and consequently cannot afford any evidence of the impression on the testator's mind evinced by him on the perusal of it. The second letter was addressed to the testator by *Oliver Marton*, the vicar of Lancaster, dated the 20th of May, 1786, in which the writer begs the testator to order his attorney to wait on Mr. *Atkinson* or Mr. *Watkinson*, for the purpose of getting a case stated for the opinion of counsel, respecting some matters in difference between the testator and the parish; and requesting an answer. No answer appears to have been given, nor has any personal act of recognition by the testator been proved. But after his death the letter was found in the cupboard, indorsed in the hand-writing of Mr. *Barrow*, who was the testator's attorney, "20th May, 1786. Letter from Mr. *Marton* to Mr. *Marsden*." Mr. *Barrow* had been dead above thirty-five years at the time of the trial. It was strongly contended that as the letter appeared by the indorsement to have come to the hands of Mr. *Bar-*

*row*, the testator's attorney, the testator must be presumed to have given it to him, pursuant to the request contained in the letter, and that his having done so afforded evidence of his understanding the letter and acting upon it. If the delivery of the letter to *Barrow* by the testator be assumed, the consequence deduced from it will be just. But upon what ground can that fact be assumed, in a case where the issue turns—upon the testator's mental soundness or unsoundness; upon his capacity or incapacity, to act reasonably for himself. It is reasonable that a person who receives a letter addressed to him containing a request to give orders to his attorney, should give orders accordingly. But if the giving such orders be relied upon as proof of the receiver's reason, it ought to be shewn that the orders were given by him. That fact is the only foundation upon which the inference rests, and without proof of which no inference whatever can arise. In truth the course of reasoning is this,—the testator delivered the letter to *Barrow*, because he understood it, and he understood it because he delivered it. In this case it is in no way shewn how the letter came into *Barrow*'s hands, nor when he indorsed it, whether he received any orders respecting it, whether anything was done upon it, nor upon what occasion it came out of *Barrow*'s hands again, and found its way to the cupboard in the testator's house. The testator's affairs may have been conducted by his man of business, and from the nature of the case it is quite as likely that the letter should have been given or sent to *Barrow* by him as by the testator. At all events the supposition is not inconsistent with anything that appears upon the record.

It has been said that if the presumption of the testator having given or sent the letter would have been receivable in the case of a person whose reason was not the subject of inquiry; to withhold such presumption is to assume incapacity. In my opinion neither capacity nor incapacity is to be assumed; but where the question is, whether the one or the other was the state of mind to be ascribed to the testa-

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tor, the question cannot be resolved without proof that all rational acts relied upon were the acts of the testator himself. It may be here observed, that a question arises upon this letter which affects the presumption that all the three letters in question were placed in the cupboard by the testator, on account of their being found among other letters indorsed or answered by him. Who placed *Marton's* letter in the cupboard? That letter was indorsed by *Barrow*, the testator's attorney: how and when did it come back from his hands? Did he place that letter in the cupboard? If he did, why may he not have arranged the other letters for the testator, and placed them in the cupboard also? If the indorsement of the testator's attorney does not prove *his* having put the particular letter which he indorsed in the cupboard, what ground is there for inferring from the mere indorsement of some letters by the testator that he placed in the cupboard all the letters, indorsed and unindorsed, which were found there? The grounds, when examined, appear to me far too loose to afford the foundation for any inference at all.

The last of the three letters, dated 3rd October, 1799, was addressed to the testator, and was written by *Henry Ellershaw* in the presence of *John Garnett*, his assistant, when *Ellershaw* was about to relinquish the chapelry of Hornby, to which he had been presented by the testator, and contains strong expressions of the writer's gratitude and affection. No other circumstance having been adduced to shew the testator's personal recognition of this letter beyond that of its being found with the others, it is scarcely necessary to say that if the two first letters ought to be rejected, this must *à fortiori* be rejected also.

It is obvious that the contents of letters may be dictated by various motives, according to the dispositions and circumstances of the writers. Language of affection, of respect, of rational or amusing information, may be addressed from the best of motives to persons in a state of considerable imbecility, or labouring under the strangest

delusions. The habitual treatment of deranged persons as rational is one mode of promoting their recovery. A tone of insult or derision may be employed in a moment of irritation in writing to a person in full possession of his reason. What judgment can be formed of the intention of the writers, without an endless examination into the circumstances which may have influenced them? And what opinion can be collected of the capacity of the receiver without ascertaining how he acted when he read the language addressed to him? To me it appears that the admission, in proof of capacity, of letters, unaccompanied by other circumstances than such as are stated on this record, would establish an entirely new precedent in a court of common law, from which very great inconvenience might result upon trials of sanity, as well of the living as of the dead; consequently, that the evidence was properly rejected by the judge of assize, and that the judgment of the Court of King's Bench ought to be affirmed.

PARKE B. (after stating the record.)—The question for us to decide is, whether all or any of the three rejected letters, were admissible evidence on the issue raised in this case, for the purpose of shewing that Mr. *Marsden* was, from his majority in 1779 to and at the time of making of the alleged will and codicil in 1822 and 1825, a person of sane mind and memory, and capable of making a will?

It is contended on the part of the learned counsel for the plaintiff in error that all were, on two grounds. First,—that each of the three letters was evidence of an act done by the writers of them *towards* the testator, as being a competent person; and that such acts done were admissible evidence upon this issue *proprio vigore*, without any act of recognition, or any act done thereupon by him.

Secondly,—that in each of the three cases mentioned in the bill of exceptions, or at least in one of them, there was sufficient evidence of an act done by the testator with reference to those letters respectively, to render their contents

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admissible evidence by way of explaining that act upon the principle laid down by the Court of King's Bench, in 6th *Nevile and Manning*, 146. I am of opinion, upon a careful consideration of the case and the argument on both sides, at this bar, that none of the three letters were admissible, either on one ground or the other. It will be convenient, and facilitate the arrival at a just conclusion, to keep these two questions entirely distinct from each other.

First, then, were all or any of these letters admissible on the issue in the cause as acts done by the writers, assuming, for the sake of argument, that there was no proof of any act done by the testator upon or relating to these letters or any of them,—that is, would such letters or any of them be evidence of the testator's competence at the time of writing them, if sent to the testator's house and not opened or read by him? Indeed, this question is just the same as if the letters had been intercepted before their arrival at his house, for in so far as the writing and sending the letters by their respective writers were acts done by them towards the testator, those acts would in the two supposed cases be actually complete. It is argued that the letters would be admissible because they are evidence of the *treatment* of the testator, as a competent person by individuals acquainted with his habits and personal character, not using the word *treatment* in a sense involving any *conduct* of the testator himself: that they are, more than mere statements to a third person, indicating an opinion of his competence by those persons, they are acts done *towards* the testator by them, which would not have been done, if he had been incompetent, and from which, therefore, a legitimate evidence may, it is argued, be derived that he was so.

Each of the three letters, no doubt, indicates that in the opinion of the writer the testator was a rational person. He is spoken of in respectful terms in all. Mr. *Ellershaw* describes him as possessing hospitality and benevolent politeness; and Mr. *Marton* addresses him as competent to do business, to the limited extent to which his letter calls

upon him to act: and there is no question but that if any one of those writers had been living, his evidence, founded on personal observation, that the testator possessed the qualities which justified the opinion expressed or implied in his letters, would be admissible on this issue. But the point to be considered is, whether *these letters* are admissible as proof that *he did possess these qualities*?

I am of opinion that, according to the established principles of the law of evidence, the letters are all inadmissible for such a purpose. One great principle in this law is, that all facts which are relevant to the issue may be proved; another is, that all such facts as have not been admitted by the party against whom they are offered, or some one under whom he claims, ought to be proved under the sanction of an oath, (or its equivalent introduced by statute, a solemn affirmation,) either on trial of the issue or some other issue involving the same question between the same parties or those to whom they are privy. To this rule certain exceptions have been recognized; some from very early times, on the ground of necessity or convenience; such as the proof of the quality and intention of acts by declarations accompanying them; of pedigrees, and of public rights by the statement of deceased persons, presumably well acquainted with the subject, as inhabitants of the district in the one case, or relations within certain limits in the other; such also as the proof of possession by entries of deceased stewards or receivers charging themselves, or of facts of a public nature by public documents; within none of which exceptions is it contended that the present case can be classed.

That the three letters were each of them written by the persons whose names they bear, and sent at some time before they were found, to the testator's house, no doubt are *facts*; and those facts are proved on oath; and the letters are without doubt admissible in an issue on which the fact of sending such letters by those persons, and within that limit of time, is relevant to the matter in dispute; as, for

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instance, on a feigned issue to try the question whether such letters were sent to the testator's house, or on any issue in which it is a material question, whether such letters or any of them had been sent. Verbal declarations of the same parties are also *facts*, and, in like manner, admissible under the same circumstances, and so would letters or declarations to third persons upon the like supposition.

But the question is, whether the contents of these letters are evidence of the *fact to be proved upon this issue*—that is, the actual existence of the qualities which the testator, in those letters, by implication, is stated to possess: and those letters may be considered in this respect to be upon the same footing as if they had contained a direct and positive statement that he was competent. *For this purpose*, they are mere hearsay evidence, statements of the writers, not on oath, of the truth of the matter in question; with this addition, that they have acted upon the statements on the faith of their being true by their sending the letters to the testator. That the so acting cannot give a sufficient sanction for the truth of the statements is perfectly plain, for it is clear that if the same statements had been made by parol or in writing to a third person, that would have been insufficient, and this is conceded by the learned counsel for the plaintiff in error: yet in both cases there has been an acting on the belief of the truth, by making the statement, or writing and sending the letter to a third person—and what difference can it possibly make that this is an acting of the same nature by writing and sending a letter to the testator? It is admitted, and most properly, that you have no right to use in evidence the fact of writing and sending a letter to a third person, containing a statement of competence, on the ground that it affords an inference that such an act would not have been done, unless the statement was true, or believed to be true; although such an inference no doubt would be raised in the conduct of the ordinary affairs of life, if the statement were made by a man of veracity; but it cannot be raised in judicial inquiry, and if such an argu-

ment were admissible, it would lead to the indiscriminate admission of hearsay evidence of all manner of facts.

Further, it is clear that an acting to a much greater extent and degree, upon such statements to a third person, would not make the statements admissible. For example, if a wager to a large amount had been made as to the matter in issue by two third persons, the payment of that wager, however large the sum, would not be admissible to prove the truth of the matter in issue. You would not have had any right to present it to the jury as raising an inference of the truth of the fact, on the ground that otherwise the bet would not have been paid—it is, after all, nothing but the *mere statement* of that fact, with strong evidence of the belief of it by the party making it. Could it make any difference that the wager was between a third person and one of the parties to the suit? Certainly not. The payment by other underwriters on the same policy to the plaintiff, could not be given in evidence to prove that the subject insured has been lost, yet there is an act done, a payment strongly attesting the truth of the statement which it implies, that there had been a loss. To illustrate this point still further, let us suppose a third person had bet a wager with Mr. *Marsden* that he could not solve some mathematical problem, the solution of which required a high degree of capacity; would payment of that wager to Mr. *Marsden's* banker be admissible evidence that he possessed that capacity? The answer is certain—it would not. It would be evidence of the fact of competence given by a third party not on oath.

Let us suppose the parties who wrote these letters to have stated the matter therein contained—that is, their knowledge of his personal qualities and capacity for business, on oath before a magistrate, or in some judicial proceeding to which the plaintiff and defendant were not parties. No one could contend that such statement would be admissible on this issue, and yet there would have been an act done on the faith of the statement being true, and a very

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solemn one, which would raise in the ordinary conduct of affairs a strong belief in the truth of the statement, if the writers were faith-worthy. The acting in this case is of much less importance, and certainly is not equal to the sanction of an extra-judicial oath.

Many other instances of a similar nature, by way of illustration, were suggested by the learned counsel for the defendant in error, which, on the most cursory consideration, any one would at once declare to be inadmissible in evidence: others were supposed on the part of the plaintiff in error, which, at first sight, have the appearance of being mere facts and therefore admissible, though on further consideration they are open to precisely the same objection. Of the first description are the supposed cases of a letter by a third person to any one demanding a debt, which may be said to be a treatment of him *as a debtor*, being offered as proof that the debt was really due; a note, congratulating him on his high state of bodily vigour, being proposed as evidence of his being in good health; both of which are manifestly at first sight objectionable. To the latter class belong the supposed conduct of the family or relations of a testator, taking the same precautions in his absence as if he were a lunatic: his election, in his absence, to some high and responsible office; the conduct of a physician who permitted a will to be executed by a sick testator; the conduct of a deceased captain on a question of seaworthiness, who, after examining every part of the vessel, embarked in it with his family;—all these, when deliberately considered, are, with reference to the matter in issue in each case, mere instances of hearsay evidence, mere statements, not on oath, but implied in, or vouched by, the actual conduct of persons by whose acts the litigant parties are not to be bound.

The conclusion to which I have arrived is, that proof of a particular fact which is not of itself a matter in issue, but which is relevant only as implying a statement or opinion of a third person upon the matter in issue, is inadmissible

in all cases where such a statement or opinion, not on oath, would be of itself inadmissible, and therefore in this case, the letters which are offered only to prove the competence of the testator, that is, the truth of the implied statements therein contained, were properly rejected, as the mere statement or opinion of the writer would certainly have been inadmissible. It is true that evidence of this description *has been* received in the Ecclesiastical Courts. But their rules of evidence are not the same in all respects as ours: some greater laxity may be permitted in a court which adjudicates both on the law and on the facts, and may be more safely trusted with the consideration of such evidence than a jury; and I would observe also, that in no instance has the propriety of the reception of it, even in the Spiritual Courts, been confirmed by the Court of Delegates. I do not think, therefore, that we are bound by the authority of the cases referred to in the Ecclesiastical Courts.

The next question is, whether there is any evidence of an act done with reference to these three letters, or any of them, to render their contents admissible, by way of explaining that act;—I am clearly of opinion that none of them were admissible on this ground.

The facts stated on the face of the bill of exceptions, relative to this point, are, that the three letters were found open and with the seals broken, with other letters, *after the death of Mr. Marsden*, in a *cupboard* under his bookcase in his private room, some of which other letters were indorsed in the handwriting of *Mr. Marsden*, and some answered by him, (which letters, so indorsed and answered, were received in evidence). The first of the three letters was written by one *Charles Tatham*, long since deceased, who was cousin of the testator, and then in America; it bore date the 12th of October, 1784. There was a draft of a letter from *Mr. Marsden*, in his handwriting, amongst the papers so found, dated June 1, 1787, but it contained no reference whatever to *Mr. Tatham's* letter, or any of the matters mentioned in it. The second purported to bear

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date in 1786, was in the handwriting of the then vicar of Lancaster, addressed to Mr. *Marsden*, and requesting him to order his attorney to wait on some persons therein named on matters of business; the letter was indorsed in the handwriting of Mr. *Marsden's* then attorney, who died about 1801. The third letter was in the handwriting of the curate of the place, long since also deceased.

The first remark to be made on this statement, and which applies to all the three letters, is, that the place in which they were found is not proved to be that where the testator was in the habit, in his lifetime, of keeping the letters addressed to him, which he had opened and read, or any of his papers; nor is it stated that they were found *immediately after* the testator's death. The time and place of finding, therefore, afford no evidence that the letters were placed there by the testator in his lifetime; so far as relates to the place and time of finding; the letters might have been put there after the testator's death. But, passing by that circumstance, let us suppose that they were found immediately on the testator's decease, so as to exclude any inference that they were placed there after the testator's death; I cannot see what evidence there is that they were opened, *read*, and placed there, by the *testator*, which would be acts done by him, and which would render the contents admissible, because that circumstance would prove capacity to the limited extent of his ability to open, to read the letters, and put them by. In no other way could the contents be admissible. Now there is no *direct* evidence, that is, evidence that the testator was seen to open, read, and deposit the letters in that place; and therefore the only question is, whether those facts may be *inferred* from the facts proved, that is, from the facts that the letters were found *instantly* after the testator's death, opened, and with the seals broken, in the place with other papers recognized by him. This would be a very proper inference from those facts, on the presumption that the testator had capacity to *transact business of that nature*; and if there was a cause relative to the tes-

tator's property, in which his capacity and competence were not in dispute, and an issue raised thereon, whether he had personal notice of the contents of any of the letters so found, the fact of finding them at the time and place supposed would raise the inference of such notice, but that would be founded on the presumption, that, *primâ facie*, every one is of competent understanding until the contrary is proved, and that a competent man, in that situation of life, would be able to read and understand such letters. But in this case the evidence is admissible only for the purpose of proving capacity, and for no other purpose whatever; and it seems to me that the argument in favour of admitting the contents of the letters to be read as evidence, proceeds on a fallacy. It is a clear instance of the *petitio principii*, of reasoning in a circle, it assumes the testator to be competent in order to raise an inference that he was cognizant of the contents of the letters, and then makes use of the presumed cognizance of the contents of the letters, to prove that he was competent. The reasoning proceeds thus;—because he had sufficient ability to do business, therefore it is to be inferred that he read and understood the letters; and because he read and understood the letters, therefore he is to be inferred to have been of sufficient ability to do business.

It is, indeed, said by the learned counsel for the plaintiff in error, that he makes no assumption either way; he neither assumes capacity nor incapacity, but only draws an inference from the facts of the letters being found open in the way described. But in reality, though he professes to make no such assumption, the inference cannot be drawn at all without making an implied assumption to that effect: for on what other ground can you infer from these facts that the *testator* opened, read, and placed the letters there? If he was utterly senseless and imbecile in mind and body, you could not infer that he did so; and it is only because a man, capable of reading and doing business, would naturally do such acts that you could infer that the testator did them; that is upon a presumption of competence such inference

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may be drawn, but not otherwise. Nor can you use the inference of competence derived from *other facts*, which appear upon the bill of exceptions to have been proved, to make *these* admissible, the only question being, whether *these facts of themselves* do conduce to prove that competence.

The argument, therefore, that the facts proved raise an inference of competence, seems to me clearly to be an assumption of the whole question. This objection applies equally to the case of Mr. *Marton's* letter, though the fallacy in that case is somewhat more disguised. The fact of the attorney's indorsement being on the letter, is clear proof that *he* had such possession of it in his lifetime, as to be able to make an indorsement; but that circumstance does not advance the case, in reality, a step further. The inference that Mr. *Marsden* read the letter, and finding a request to refer it to his attorney, did so, and delivered the letter to him, and therefore that he was to that extent competent, (which is the only way in which the evidence is relevant to the issue,) is altogether founded on the presumption of that competence, and is just as much an instance of the *petitio principii* as the other to which I have already referred. You assume his capacity to understand the contents of the letter and act upon them like a man of business, and infer from that he did understand the contents and act upon them; and then you use the facts so inferred, as proof of that capacity. Unless you assume the testator's competence, the only point to be proved, the fact given in evidence is not relative to the issue. It is proved that the letter was addressed to the testator, was *opened* by some one, and in the attorney's hands; if this was done by the testator, it is some little evidence of capacity; but unless you assume the testator's capacity, the only matter to be proved, you cannot draw an inference that it was done by him.

The first letter, that of Mr. *Charles Tatham*, stands precisely on the same footing, in this respect, with the others, so far as relates to its being with the testator's papers, open,

and with the seal broken, and to the inference sought to be derived therefrom, that it was opened and read by the testator. It is impossible to contend that the copy of Mr. *Marsden's* letter to him, makes the contents of his letter admissible by way of explanation, as it is no answer to it, nor contains any reference whatever to its contents, nor to the subject of it. The first letter cannot possibly explain the contents or meaning of the second, nor can the fact of Mr. *Marsden's* writing that letter raise any inference that he was cognizant of the contents of the first. So far as the fact of writing that letter proves competence, the evidence was admissible and admitted.

I am of opinion, therefore, that the contents of none of the letters were admissible, and that our judgment ought to be for the defendant in error.

PARK J.—It is with great reluctance and concern that I give my opinion in the present case; because, differing as I unfortunately do, from three of my very learned brothers, who have now delivered their judgments, I cannot but feel great doubts about the validity of my own opinion. Still it is my duty to declare my conscientious judgment; and I have at least the satisfaction of not being quite alone in the opinion I give, concurring as I do entirely with my learned brother *Gurney*, and *partly* supported, as I believe I shall be, by the very learned person who is to follow me. I am happy, too, to believe that there is no difference amongst us as to the principle or rule of law which is to govern this case: the difference that arises is upon the application of the facts to that principle.

The question is, whether the three letters mentioned in the bill of exceptions, or any or either of them, ought to have been received in evidence by my learned brother at the trial? No such letters were much pressed upon me at the first trial, though I believe they were tendered; but upon the second trial, before my brother *Gurney*, he rejected them, or similar letters, and a bill of exceptions was ten-

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dered to him upon that ground. That point came to be argued in this Court with another exception, and as all the judges agreed in favour of the plaintiff in error, upon the second exception, it was not necessary then to decide the first, the judges then present not being unanimous, as I lament they are not unanimous now. The point now, as it was argued formerly, was as to the admissibility of certain letters written to the testator by respectable persons now deceased, well acquainted with the testator, which ought to be laid before the jury, to shew in what manner the testator was *treated* by the letter writers; and such treatment ought to be shewn in order to disprove his alleged imbecility. I adopt the rule laid down in the King's Bench, (6th *Nevile* and *Manning*, 146,) that it ought to appear that some act, (that Court admitting that the least act done by the testator would be sufficient,) that some act done by the testator, with reference to the letters, would have made them evidence, for such act could not properly be explained without reference to them; and, if received, no rule of law could have prevented their full effect from being produced on the minds of the jury. To all that I accede, and I insist that some act *was done by him*, as to all the three letters in controversy, but most assuredly as to *one* of them.

In the outset it must be remarked, that the date of these letters is very remote, one of them being fifty-three years old, another fifty-one, and another near forty years old. I am not prepared to say, if these letters had been very modern, and the supposed insanity had recently taken place, there might not have been more ground of suspicion; indeed, probably modern letters could not be at all received, especially if the writers of them were alive. But in this case, the party now appealed against, denied the testator's competency, alleging his entire natural incapacity *à nativitate*.

This, I own, seems to me opening so wide a space for investigation, admitting, on the one hand, treatment of persons who considered him weak and an idiot, and I think, on

the other, there ought to be admitted the expressions he used, and his manner of conducting himself, and also the manner in which he was received, treated and dealt with by respectable and honourable persons, at a time long before, years before, nay, nearly half a century before any question arose respecting a will, excluding thereby all possibility of fraud or collusion. Upon this subject, the passage referred to from Mr. *Starkie's* invaluable work, and which is well supported by the authority of cases, is not inapplicable to the present discussion. "It seems to follow, (says this learned author,) that all the surrounding facts of the transaction, or, as they are usually termed, the *res gestæ*, may be submitted to a jury, provided they can be established *by competent means*, and afford any fair presumption or inference as to the question in dispute, for so frequent is the failure of evidence, from accident or design, and so great is the temptation to the concealment of truth, and misrepresentation of facts, that no competent means of ascertaining the truth can or ought to be neglected, by which an individual would be governed, and on which he would act with a view to his own concerns in ordinary life."

Taking this then to be a sensible rule, let us see whether *competent means* have not been rejected, as evidence to shew the opinion of all those honourable persons by whom he was surrounded, and who treated him as a sane, and though not a bright, yet a man *competent to the ordinary concerns of life*. It seems to me impossible to suppose that persons of character and intelligence, who were well acquainted with him, wrote *such* letters to him as they would not have addressed to any but a person whom they supposed to be of a sound mind, and this covering the period in which he is said to be unfit for associating with the general class of men, with whom his station in life would otherwise entitle him to associate.

The first material letter which was rejected, was one from *Charles Tatham*, the testator's cousin, dated from

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America, as long ago as the year 1784, the contents of which have been much commented upon. (His lordship here read the letter.) This letter was marked, as the bill of exception states, with the London post mark, as a ship letter, and was in the handwriting of *Charles Tatham*.

Let it be observed, and I think it a most material circumstance, that amongst the papers of the testator was found, as appears by the bill, a draft or copy of a letter from the testator to the said *Charles Tatham*, in the handwriting of the testator, which, though not an answer to the former, being written three years after, shew that a correspondence was going on between these two cousins. (His lordship then read the copy of the letter from Mr. *Marsden* to *Charles Tatham*.)

This letter, I think, is an important one, because it seems to me impossible that any man could read this letter, written by Mr. *Marsden* himself, a period of fifty years from the time I am making these observations, and suppose that a man could have written such a letter as this, who had not some intelligence about him. In this letter he refers to a letter he had written before to his cousin. It is a sort of gossiping letter, but giving him an account of his friends in England, that one of his friends is going to be married, and that his aunt was likely to die. It shews that he had an intelligent mind, in my humble judgment, and if this be not an acting between correspondents, I know not what is.

For the present I pass over Mr. *Marton*'s letter, the vicar of Lancaster, though anterior in point of date to the one I am about to mention, namely, that of Mr. *Ellershaw*, a clergyman of the Church of England. This letter is dated in 1799, and I cannot bring my mind to believe that any man of that sacred function could write such a letter, expressive of such sentiments of the piety and benevolence of the person to whom it was addressed, by one who for years had been his spiritual pastor and guide; and who, being about to quit, or having actually quitted his charge,

must have been the vilest hypocrite to write such a letter, without one secular motive to serve in doing so.

But what are we to say to the rejection of the letter of the Rev. Mr. *Marton*, dated as long ago as 1786. He lived nine miles, or more, from the testator. He was vicar of Lancaster; the last man in the world, we should suppose, to write to an idiot; and he writes a letter and sends it to Mr. *Marsden* upon *business*, and on business merely requesting *him* to attend, or *order* his attorney to attend a meeting, and propose some terms of agreement.

Now Mr. *Marsden's* attorney, Mr. *Barrow*, who was afterwards a barrister, lived at Lancaster, some miles from Wennington, where Mr. *Marsden* then lived, and we find Mr. *Barrow's* indorsement upon it; so that he must have gone to Mr. *Marsden* on being sent for, or Mr. *Marsden* to him, to do the needful. But it is doubted by the defendant in error, whether Mr. *Marsden* ever read it. The date of the letter is the 20th of May, and that is the *same* date in the indorsement by Mr. *Barrow*; and as the letter is directed to Mr. *Marsden*, at Wennington, and Mr. *Barrow* living some miles off, at Lancaster, it must have been sent that very day to Mr. *Barrow*; and why are we to suppose that some person, at that distant period, half a century from this time, opened that letter and sent it to Mr. *Barrow*, unknown to Mr. *Marsden*, and foisted it in amongst other papers, to furnish evidence, half a century afterwards, to establish a will which did not then exist, and did not exist till 1822, nor the codicil till 1825? If these are not acts of recognition as laid down by the Court of King's Bench, I know not what other acts can be so considered.

But it is said, the testator has done no act upon it—I deny that: first of all, I have mentioned the length of time since which these letters were written; two of them above fifty years ago, one of them nearly forty years since. Where were they found? With *other papers*, in a *cupboard* under his *bookcase*, in his *private* room, and the letters had all

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been opened. It is not stated that the cupboard was open to all the world, or that his *private* room (for so the bill of exceptions calls it) was accessible to all intruders : it must be considered as his place of deposit. The seals of all were broken ; and one cannot believe but that they were read and laid by. An idiot never would have done so ; he would have thrown them aside. I have heard it stated, and I believe it to be so, that such letters as these would have been received in the Ecclesiastical Courts, but I cannot get at sufficient evidence to enable me to found my opinion upon their practice, and therefore I do not. It has been said indeed, that, even if it were so, their rules of evidence are different from ours. It may be so, but if so, I lament that in the same country, though the rules of practice and form in different courts may differ, the substantial rules of evidence should vary. Here, however, I have declared my own opinion upon the rules of our own law, but with great doubt and hesitation, on account of the opinion of those opposed to me, and it must be recollected that all fraud is excluded. I also lament with deep concern, that this sort of evidence has been pressed, because, having been the first common law Judge to try this cause, about six or seven years ago, when such evidence I believe was tendered to me, though not pressed, it does appear to me, that the admission or non-admission of such letters as these was a feather in the scale of justice. However, I am bound to declare, in my serious and conscientious opinion, that such letters, under the circumstances, should have been received. But I must say, humbly, that the rejection of the letters has been supported upon a variety of conjectures and suppositions wholly unfounded, imputing fraud to persons who hardly existed at the time those letters were written ; and therefore I am of opinion, the judgment of the Court of King's Bench ought to be reversed.

TINDAL C. J.—The question raised upon this bill of

exceptions is, whether three letters therein set forth, or any of them, ought, under the circumstances stated in the bill of exceptions, to have been held by the learned judge who tried the cause, to be admissible as evidence before the jury, on a question of the competence of the party to whom such letters were addressed, and the conclusion at which my mind has arrived is, that one of those letters, namely, that which was written by *Mr. Oliver Marton*, the vicar of Lancaster, ought to have been held admissible, and its contents to have been submitted to the consideration of the jury, but that the other two letters were properly rejected.

The question to be determined by the jury was, whether or not the testator *John Marsden* was and had been from the time he attained his full age in 1779, and down to and at the time of his making his will and codicil, in the years 1822 and 1825 respectively, a person of sane mind and memory capable of making a will?

In order to determine that question, I conceive all that was said, written, or done by the testator himself at any time during such period, was the most direct and the best evidence to ascertain the state of his understanding, and that the next in degree, because intimately connected with it, would be all that was said to him, written to him, and done to him, during the same period, by his friends and others who had access to him; provided always, that what was so said, written, or done to him by others, is shewn to have come home to his actual knowledge, but I consider this condition to be indispensable, as to the admissibility of this second class of evidence; for as to what was said by others, but not heard by the party whose understanding is the subject-matter of inquiry, or written by others, but which never reached him; or done by others, but never known by him to have been done: it appears to me that such speaking, or such writing, or such acting, can amount to no more than an expression of the opinion of the speaker, or the writer, or the actor, and that such opinion, not having been

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given upon oath, and not being subjected to cross-examination, as to the grounds upon which it was originally formed or continued, cannot upon that account be deemed admissible in evidence. I cannot, therefore, accede to the position which has been contended for by the learned counsel on the part of the plaintiff in error, that mere treatment of the party by others without or beyond the reach of the knowledge of the party himself, or, as it was sometimes expressed, *conduct of others towards him*, although not amounting to *conduct to himself*, can form a legitimate or admissible species of evidence; evidence of that description may have been held admissible in questions relating to the *status* of mind, or competency of a testator before Ecclesiastical tribunals; those courts perhaps, and not improperly, may have allowed evidence of the manner in which a person has been treated by his friends and others, without inquiring whether those modes of treatment came home to the understanding of the testator. But in an Ecclesiastical Court the same persons are judges both of the law and the fact, and their experience and sagacity may be sufficient to prevent any injurious consequences from a class of evidence which approaches so closely to, if it is not in fact mere opinion of the witness, by giving such testimony no more weight than it really deserves. But our rules of evidence are calculated for trials before popular tribunals, and one of the first objects of the law of evidence in those courts is, to exclude the admission of any evidence which may, by possibility, mislead the understanding of the jury.

I therefore consider such treatment only of a person by his friends or others to be admissible in evidence, upon a question concerning his competency, as appears to have come home to his understanding, and upon which he has been shewn in some degree to have acted; for, after all, it is not the treatment itself which is of any value, but the mode in which the party conducts himself when such treatment takes place. It is not what the third person does, or

says, or writes, which furnishes of itself any indication of the state of mind of the party respecting whom the inquiry is made, but what such party himself does, or says, or writes, or how he conducts or bears himself on the occasion; for even his refusal to act, or his silence, may, in some instances and on some occasions, furnish evidence as strong upon the state of his mind, and speak as loudly and intelligibly as any act or answer however direct, and this I take to be in effect the rule laid down by the Court of King's Bench upon a motion for a new trial in this very cause, the decision of which is reported in 6th *Neville and Manning*, 132, and with which I entirely concur; and I cannot frame to myself any other general rule that is equally intelligible, and capable of application to the infinitely various modes and questions of evidence which must necessarily arise and present themselves on such a subject of inquiry.

The question, therefore, I consider to be reduced to this, whether, taking into consideration the several circumstances stated in the bill of exceptions as to the finding of these letters, and the evidence contained therein of the dealing with these letters or their contents by the testator in his lifetime, the judge was right in rejecting all of them as inadmissible?

In considering this question, the first thing to be observed is, we have no right to import into the case any suspicion of fraud, either with respect to the place in which these letters were found deposited, the time at which they were first discovered, or the facts attending their discovery; fraud of any kind is not to be surmised, but must be expressly found; and if the reasoning upon the facts stated in the bill of exceptions, is to be allowed in any manner to receive a bias or colouring from a suspicion of fraud, where the precise facts to support such fraud are not stated, the minds of no two individuals can expect to arrive at the same result from the same premises. The facts attending the

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finding of these letters, might undoubtedly have been stated with more precision and accuracy ; but I take the result of the statement to be, that these letters were found in a place where the testator usually kept his letters and papers in his lifetime, for they were found with many letters addressed to him by various persons, of dates extending over a considerable period of time, at the very least from 1784 to 1799, and with other papers of the testator, so that the reasonable inference is, that this was his usual place of deposit of letters and papers, and a cupboard under his bookcase, in his private room, being a place not unusual for the safe custody of letters and papers. As to *the time* at which they were discovered, the bill of exceptions is silent ; the reasonable inference therefore is, that they were found at the time when such matters, according to the usual course of business and ordinary experience, are searched for and found ; that is, at such short and reasonable time after the death of the testator as is sufficient to arm the personal representative with an authority to search and examine the papers of the deceased.

Now, taking the three letters into consideration, and applying to them that test before adverted to, namely, whether there is sufficient evidence to shew that they came to the hands and knowledge of the testator, or that there was any dealing with them on his part, as with letters that actually came to his hands, I think, with respect to the first, i. e. the letter of the date of the 12th of October, 1784, the learned judge was right in holding that it was not admissible. It is stated in the bill of exceptions, that to some of the letters answers had been written and sent, of which copies had been preserved in his own hand-writing, and that others were indorsed by him in his hand-writing, by which I understand that the name of the writer, or the date of the letter, or both, were put upon it. But that as to the letter in question, it had neither of these *indicia*, from which any inference could be drawn that it had been actually submitted

to his mind, or that he had ever read it at all. All that appeared was, that it was open and that the seal was broken; and although it appears that another letter was afterwards sent to him from the same relative who wrote the letter now under discussion, to which he returned an answer of the date of the 1st of June 1787, yet this subsequent correspondence does not impress my mind with the conviction, that the particular letter in question must necessarily have come to his knowledge, or that he exercised his understanding upon it. The same observation applies still more strongly to the letter from *Mr. Ellershaw*, of the date of the 3d of October, 1799, as it wants even the confirmation and support arising from the subsequent correspondence between the parties, which the first letter possesses.

But with respect to the letter dated the 20th of May, 1786, and written by *Mr. Oliver Marton* to the testator, I think there are circumstances extrinsic of the letter itself, which shew that the letter had come to the testator's knowledge, and that he had exercised so much understanding upon it as was sufficient to have authorized its admission to the jury, and that it ought accordingly to have been submitted to their consideration. This letter was addressed to the testator at Wennington, where he resided at the date of the letter. It was found amongst the other letters and papers, after the testator's decease, at Hornby Castle, the place where he resided at his death. So far as the evidence goes, the letter must be taken to have been brought there either by himself or by his orders, with his other letters, for no ground is laid in the bill of exceptions for the inference, that it was brought there by any indirect means, or for any indirect purpose. The letter recommends that the attorney of *Mr. Marsden* should wait on *Mr. Atkinson* or *Mr. Watkinson*, respecting a dispute mentioned therein, and that a case should be settled by *Mr. Marsden's* and their attorneys.

This letter is found in the place and at the time before commented upon. It is found open and with the seal

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broken, and indorsed in the hand-writing of Mr. *James Barrow*, who was at that time his attorney, and with the date and name of the writer.

The letter, therefore, must have got into the hands of the attorney of the testator, the very person who, from its contents, was not only the most proper person, but the only person in whose hands it should be placed.

The question is, whether, the circumstances stated in the bill of exceptions, shew a reasonable ground for the judge to be satisfied that this letter must have reached the attorney's hands through the instrumentality in any way of the testator,—whether in any way he had acted upon it? For if there was reasonable ground for such opinion, then the letter should not have been withheld from, but should have been submitted to the jury, as one out of the numerous facts upon which their determination should be founded.

Now it appears to me, as I have before observed, that in the determination of this point, all suspicion, or surmise of fraud, is to be carefully kept out of view, and the several facts stated in the bill of exceptions are to be treated as if they occurred in the course of a real and genuine transaction. The bill of exceptions states no fraud, because none appeared at the trial, and consequently the judge who is to determine upon the admissibility of the evidence, is not at liberty to presume any. The first point to be observed is, that the letter gets to Mr. *Marsden*, the testator, for to him it is addressed at Wennington, where he then lived, and with his other letters and papers it is found after his death, open, and with the seal broken. In the next place, it appears that it did, in some way or other, come into the hands of Mr. *James Barrow*, the attorney of Mr. *Marsden*, the very person to whose consideration it was to be submitted, according to the directions of the letter itself.

This is the inference that is naturally to be drawn from the circumstance of the indorsement having been made by him, for, upon what ground can it be said that the indorse-

ment is found to be made upon this letter in the hand-writing of Mr. *Barrow*, and the indorsement on all the other letters (such as are indorsed) in the hand-writing of Mr. *Marsden*, except that this particular letter was, by the subject-matter of it, required to come to, or to be put into the hands of Mr. *Barrow*?—a circumstance which did not apply to any of the others. Now this letter could only get into the hands of Mr. *Barrow* (without the supposition of fraud, which is always to be excluded, where none is suggested,) in two ways, either by the sending of the letter by Mr. *Marsden* to Mr. *Barrow*, and his returning it back again, or by Mr. *Barrow* taking it with the assent of Mr. *Marsden*, and again returning it to Mr. *Marsden*. In any other way there must have been contrivance or unfair dealing with the letter, on the part of Mr. *Barrow* or some other persons; and if the letter was forwarded by either of those means, it denotes a dealing with the letter by Mr. *Marsden*, which makes it admissible evidence for the jury. The objection against this mode of reasoning appears to be raised, that it is in the nature of a *petitio principii*, or an assumption of the very thing which is to be proved, viz.:—the rationality of Mr. *Marsden*; but I cannot feel the full weight of this objection. The judge who presides at the trial, by admitting this evidence, is not determining, nor has he any right to determine, the question of the competency of the testator. That is the question which the jury are to decide, after the termination of a long course of conflicting evidence. All the judge has to determine is, whether a particular piece of evidence is, at a particular period of the cause, admissible for the consideration of the jury, as the matter then stands; that is, with respect to this letter, whether there is reasonable evidence to satisfy his mind that it came to the testator, and that he exercised some act of judgment or understanding, though in ever so small a degree, upon it: and, as it strikes my mind that the evidence fully justifies such inference, I think this letter ought to have been admitted.

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I cannot, in conclusion, but express my regret that the production of these letters was made so strong a point at the trial of the cause, for either their admission or their rejection must endanger the verdict, whilst at the same time it is obvious that their production or their absence would have very little effect indeed upon the minds of the jury. But as the parties have thought proper to raise the question, I am bound to give my opinion as it is formed, upon the facts stated in the bill of exceptions; and I think, upon those facts the inference is, that the letter of Mr. *Marton* reached the testator, to whom it was addressed,—that it was acted upon by him,—and consequently that it ought not to have been rejected at the trial; and on this ground, I think the judgment ought to be that of a *venire de novo*.

Judgment affirmed.

END OF TRINITY TERM.

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MICHAELMAS TERM,

IN THE FIRST YEAR OF THE REIGN OF VICTORIA.

The Judges in Banc this Term were,

Lord DENMAN C. J.	WILLIAMS J.
PATTESON J.	COLERIDGE J.

In the Bail Court,
LITLEDALE J.

Ex parte the Churchwardens and Overseers of the
Parish of BROSELEY.

Thursday,
Nov. 2nd.

UPON an examination of one *Thomas Smith* before two justices, an order was made for the removal of *Mary Mason*, widow, and her four children, from the parish of Broseley, in the county of Salop, to the parish of Eaton, in the same county.

The copy of the examination sent with an order of removal, stated that the hiring and service took place in 1813; but at the hearing of an appeal against this order, the same witness stated that the hiring and service took place in 1810, and not in 1813: the sessions held that this was a fatal variance from the statement in the copy of

The evidence of *Thomas Smith*, as stated in the copy of his examination sent by the parish of Broseley in pursuance of the 5 & 6 Will. 4, c. 76, s. 79, was as follows:—"In 1813 I occupied a farm at W., in the parish of Eaton. About three days before Shelton May Fair Feast, I hired *Edward Mason*, the late husband of the pauper *Mary Mason*, to be my servant; and he requested that I would allow him to see the fair, and he promised to come into my service on the fair night, which he did, and remained in my service in the said parish of Eaton for one whole year, and I paid him his full wages for the same." The parish the examination, and quashed the order. The Court of K. B. refused a mandamus to rehear the appeal, as the sessions had decided that evidence of the settlement in 1810 was inadmissible.

Semble, that the decision of the sessions was right, as the 81st sect. of 4 & 5 Will. 4, c. 76, with regard to the examinations and notices, ought to be strictly construed.

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of Eaton appealed against the order of removal, and stated in their notice as the ground of appeal, "that there was in fact no such hiring or service for a year as in the examination of *Thomas Smith* in this case is stated."

Upon the appeal being heard at the Shropshire Midsummer quarter sessions, *Thomas Smith*, upon being called for the respondents, stated that the hiring took place in 1810, and not, as he had previously stated, in 1813. The sessions thought this was a fatal variance from the settlement stated in the examination, and quashed the order.

Archbold now moved for a mandamus to the justices at quarter sessions to enter continuances and hear the appeal. The sessions in this case have decided the question without hearing the evidence which was tendered. It is true that sect. 81 of the New Poor Law Act does not allow evidence to be gone into, on the hearing of an appeal, of any other grounds of removal than those which are set forth in the examination. But the grounds of removal attempted to be shewn in this case were the same as those set forth in the examination; viz. a hiring and service of the pauper's husband in Eaton; the only variance is in the date. That is not an error of substance, nor sufficient to authorize the decision of the sessions. The notices and copies of the examinations directed to be sent by this act, assimilate themselves to the bills of particulars accompanying declarations in the superior Courts. It is true when particulars of demand are delivered, parties are not allowed to give any evidence out of them; but the error of a mere date has never been allowed to preclude the plaintiff from going into his case. This appears clearly by the instances collected in 1 *Tidd*, 599, (9th ed.) Some cases have been already decided in this Court on this point. In *The King v. The Justices of Cornwall* (a), the Court held that a general statement in a notice was sufficient; but that case is certainly overruled. [Lord Denman C.J. I do

(a) 1 N. & P. 144.

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not know that the case has been overruled, as the circumstances there were peculiar; but certainly, in a subsequent case (*a*), the Court laid down that the notice of appeal should give an accurate statement of the grounds relied upon by the appellants; and I am quite disposed to think that that is the proper construction to put upon the statute.] In *The King v. Cumberland* (*b*), where the sessions refused to hear evidence as to a particular point, this Court granted a mandamus to them to rehear the case. [Lord Denman C. J. In that case the sessions thought they had not jurisdiction to go into a question of marriage; but here the sessions have exercised their discretion in rejecting the evidence.] It would be a great hardship to parishes to construe the 81st sect., with regard to examinations, so strictly; for it will be observed that the terms of the examination are not the language of the removing parish; and the examination in this respect differs from the notice of appeal, which may with reason be construed more strictly.

LORD DENMAN C. J.—The Court of Quarter Sessions have already decided on this case, which is a sufficient answer to this application. I think they have decided rightly; for by the terms of this examination the parish of Eaton would only be induced to inquire as to a hiring and service in the year 1810, and would be completely surprised by a hiring and service being set up three years later. With regard to *The King v. Cornwall* (*c*), I certainly appear to have said that there was sufficient information given to the parish in the general terms of the grounds of appeal there; and I think in that case there was, on taking the order and examination altogether. It has been thought by my learned brothers since, that such a general mode of complying with the terms of the statute, as was then resorted to, does not give the requisite informa-

(a) *The King v. Justices of Derbyshire*, 1 N. & P. 703.

(b) 4 A. & E. 695.

(c) 1 N. & P. 144.

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tion to the other parish contemplated by the legislature; and I must say I agree in that latter construction.

PATTESON J.—I also agree that the sessions have decided this case; and I am by no means prepared to say that they have come to a wrong decision. I am clearly of opinion that we shall do much better by construing all the notices and orders, required to be sent by the act, as strictly as possible. In *The King v. Cornwall* (a), as my lord has pointed out, there were very peculiar circumstances: the question in that case turned upon a point of law, namely, whether the children of a wife are removable to the parish of her second husband (b); and the notice of appeal really did give information of the question intended to be tried.

WILLIAMS J.—I am entirely of the same opinion; and I am by no means satisfied that the sessions were wrong. The object of the legislature, in requiring these notices, was, that each parish should be informed of what was intended to be tried on the appeal; and the best mode to carry that intention into effect, is to hold that a strict compliance with the terms of the notice is necessary.


COLERIDGE J.—I think this case, so far as respects the propriety of the determination arrived at by the sessions, may be decided by *The King v. Holbeach* (c). In that case the ground of appeal stated that the pauper had stipulated for two days' holiday at Spalding Club Feast; and we held that the sessions were wrong in admitting evidence that the exception was for one day at Holbeach Fair. If that case was rightly decided, and I think it was, it certainly governs the present case.

Rule refused.

(a) 1 N. & P. 144.

(c) 1 N. & P. 137.

(b) See *Rex v. Reltenden*, 1 N. & P. 448.



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Wednesday,
November 8th.

The QUEEN v. The Inhabitants of CHURCH KNOWLE.

ON an appeal against an order, dated 27th June, 1835, removing *Robert Galley* from the parish of Church Knowle, in the county of Dorset, to the parish of St. Martin, in the city of Salisbury, the sessions quashed the order, subject to the following case:

A former order of removal had been made upon the examination of the pauper, *Robert Galley*, on the 20th day of December, 1834, touching his hiring and service with one *James Furber*, in or about the year 1824; but it did not state as a fact, that during such service the pauper resided in the appellant parish. A copy of this order, together with the examination of the pauper, was sent by the churchwardens and overseers of the parish of Church Knowle, to the churchwardens and overseers of the parish of St. Martin. Against this order an appeal was entered by the parish of St. Martin, at the Epiphany sessions for the county of Dorset, 1835, and respited to the Easter sessions following. At the Easter sessions, the parish of Church Knowle having discovered that in the pauper's examination no mention was made of his having resided in the parish of St. Martin, moved on this ground only, but without stating this or any other grounds either to the Court or the appellant parish, to quash their own order, which was done generally, and with the consent of the appellant parish. The pauper having again become chargeable to the parish of Church Knowle, a second order of removal to the parish of St. Martin was made upon another examination of the pauper, dated 27th June, 1835, touching the same hiring and service with *Furber*, and also upon an

1. Where an appellant parish gives a notice of appeal against an order of removal, signed by eight parish officers, and afterwards a statement of grounds of appeal, signed by four only, held that they are not estopped from shewing that the latter is signed by the proper number.

2. Where an appeal against an order of removal has been quashed by consent, at the instance of the respondent parish, but without communicating to the appellants the grounds on which it was quashed, the order of sessions is conclusive between the two parishes.

3. The respondents had obtained an order of removal, on a

settlement by hiring and service in the appellant parish, but the copy of the examination, on which the pauper was removed, did not state any residence by him in the appellant parish, the respondents, on discovering this omission, procured their appeal to be quashed, by consent of the appellants, but did not communicate on what grounds, either to the sessions or the appellants:—Held, that the order of sessions quashing the order of removal being general, was a decision on the merits.

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examination of the said *Furber*, touching the same hiring and service, and copies thereof were sent to the churchwardens and overseers of St. Martin. On the 17th of August, the appellant parish sent to the overseers and churchwardens of the parish of Church Knowle a notice of appeal, signed by four churchwardens and four overseers, therein described as the churchwardens and overseers of the poor of the parish of St. Martin, in the city of New Sarum, and on the 5th of October, a statement of the grounds of appeal, signed by two churchwardens and two overseers only, therein described as the churchwardens and overseers of the poor of the parish of St. Martin, in the city of Salisbury, and the appeal was entered at the Michaelmas sessions. The grounds of appeal against the second statement, were the same in the second statement as those in the first statement, with the addition of a distinct ground of appeal, as follows:

“And because a former order of the same justices, for removing the said pauper from Church Knowle to St. Martin aforesaid, had been quashed by the Court of Quarter Sessions, for the said county of Dorset, at the April session, in the present year, and which said order of the said Court related directly to the point then and now in question between the parties to the present appeal, and is therefore binding and conclusive between them, so far as respects the place of the last legal settlement of the said *Robert Galley*.”

At the hearing of the appeal, the Court overruled an objection made by the counsel for the respondents, that the appellants were bound by the description contained in the notice of appeal of the four churchwardens and four overseers who signed the same, and were thereby precluded from putting in the statement of the grounds of appeal signed by two churchwardens and two overseers only. The same Court overruled an objection made by the counsel for the appellants, to the reception of parol evidence to explain the grounds on which the respondents had moved

to have the first order quashed, and after hearing the same, thought the quashing of the said order conclusive as between the same parties, and accordingly quashed the last order. If the Court of King's Bench should think that the statement of the grounds of appeal against the last order was improperly admitted, then the order of sessions is to be quashed, and the last order of removal confirmed; or if the Court should think that the justices were not warranted in treating the first order quashed, under the circumstances, as conclusive, then the order of sessions is to be quashed.

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Barstow and *Lucena*, in support of the order of sessions. The case raises two points, 1st, whether the statement of the grounds of appeal was properly signed; 2d, whether the first order of sessions was conclusive between these two parishes.

I. The first objection proceeds on an estoppel, which is sought to be set up against the appellants, namely, that as their notice of appeal was signed by four churchwardens and four overseers, their statement of grounds of appeal being only signed by two churchwardens and two overseers, was clearly bad. The question is important, if it can be raised here, by whom the notice of appeal should be given. It is clear that when a statute directs that notice of appeal shall be given generally, a verbal notice is sufficient, *The King v. Justices of Surrey* (a); and although the 4 & 5 Will. 4, c. 76, s. 81, requires that the statement of grounds of appeal shall be given in writing by the overseers or guardians, it is submitted on principle, that it is quite sufficiently if such a statement be signed by half of the overseers only. But the point does not arise here, for in fact the statement of the grounds of appeal was signed by all the parish officers of the appellant parish. By two local acts (b), the two parishes of which Salisbury consists, are united for the


First point:
 An appellant parish not estopped from proving the grounds of appeal, rightly signed, by their notice of appeal.

(a) 5 B. & Ald. 539.

red to in the argument on both sides.

(b) These acts were not mentioned in the case, but were refer-

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maintenance of the poor, but there is an express proviso, that for the purposes of settlement, the parishes shall be distinct; therefore, although all the officers of the whole union signed the notice of appeal, the additional names may be treated as surplusage, as in fact all the officers of the appellants parish have signed the statement, and have therefore complied with the letter of the act.

Second point:
An order of
sessions quash-
ing an order of
removal, con-
clusive be-
tween the two
parishes.

II. On the point of the former order of sessions, not being conclusive between these parishes, *Rex v. Wick St. Lawrence* (a) will be relied on by the other side, but in that case the sessions held that the first order of sessions was not conclusive, because the *status* of the pauper was changed on the second order of removal being made. Here, it is clear that the same grounds of removal were to be relied on for the second as for the first removal. The residence of the pauper in the parish to which he was removed, constituted one of the grounds of removal, and it was from the omission of that ground that the respondents applied to quash their own order. The decision of the sessions, therefore, was not a decision on a point of form, but a decision on the merits. The only cases in which an order of sessions quashing an order of removal, has been held not to be conclusive, are those in which the quashing has proceeded on a point of form only. It cannot be said that an omission in a statement of settlement by hiring and service, of any residence in the parish, is an omission of form only, as it goes to the very essence of the settlement. *Rex v. Bradenham* (b) shews how strongly this Court is disposed to rely on the conclusiveness of a former order of sessions, and if that rule is to be infringed upon, by allowing respondents to quash their own order, again and again, without giving the appellants any notice, and then to go into evidence at last to shew on what grounds they moved to quash their order, the hardship on the appellants is apparent, and the inconveniences of the practice excessive.

First point.

Bond and Stock, contra. I. The appellants ought not to

(a) 2 N. & M. 289; 5 B. & Ad. 526. (b) Burr. S. C. 394.

have been heard on the statement of grounds of appeal. The local acts not being set out or referred to, the case itself only can be looked at to ascertain the facts, and from that it appears that there are eight parish officers of the appellant parish, only four of whom have signed the statement of grounds of appeal. If therefore it is contended by the appellants, that there are only four parish officers of their parish, the proof of it lay upon them. But by the case it appears that no such proof was given. Then, being signed by four only, it does not comply with the statute, (4 & 5 Will. 4, c. 76, s. 81,) the farthest decision on the point, *Rex v. Derbyshire (a)*, only admitting signature by the majority of parish officers to be sufficient. [Lord Denman C. J. Can we say upon the statement of the case, that there was no evidence given as to the signatures to the statement of appeal, for it appears that an objection was taken to its sufficiency and overruled, it must be presumed therefore that the sessions admitted it properly.] The sessions do not give any decided opinion on the sufficiency of the notice, but overrule the objection generally.

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II. It is now a clear principle in sessions law, that an order of removal quashed, without discussion of the merits, is not conclusive. *Rex v. St. Andrew's, Holborn (b)*, is the leading case on this point; there the first order was quashed, because it erroneously stated that the pauper was legally settled in St. Andrew, the removing parish, and the Court held, that being a defect in form only, it did not conclude the parties. So in *Rex v. Wheelock (c)*, where the sessions quashed the order without entering into the merits, the Court of King's Bench held that the order was not conclusive, and that evidence was admissible to explain on what ground the decision proceeded. *Rex v. Penge (d)*, and *Rex v. Wick St. Lawrence (e)*, completely decide the present case. A decision, therefore, upon any informality

Second point.

(a) 1 N. & P. 703.

(b) 6 T. R. 613.

(c) 5 B. & C. 511.

(d) Nol. Rep. 176.

(e) 2 N. & M. 289; 5 B. & Ad. 526.

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in the order is not binding. What amounts to an informality, is described by Lord *Denman* C. J., in *Rex v. Cottingham* (a),—"It is argued that it must be an informality on the face of the order: I cannot agree to that. Interpreting the meaning of the magistrates according to popular language, and in the usual sense of the words, we must understand that they meant to state that the order was not quashed on the merits." The omission here was a mere informality, in not complying with the form of statement prescribed by sect. 81, for it is clear that the residence ought to be stated in the statement for grounds of appeal; on this point the case is almost identical with *Rex v. St. Andrew, Holborn* (b). It is true that in some of the cases, where the order of sessions has been held not conclusive, a special entry has been made in the sessions records, but in *Osgathorpe v. Diseworth* (c) the sessions refused to make such an entry, and in the strongest case on the point, *Rex v. Wick St. Lawrence* (d), no such entry was made, and the reasons for quashing were not even mentioned to the Court. There is nothing whatever to distinguish that case from the present, but the mere fact of the communication to the respondents, by the appellants' attorney, of the grounds for quashing, and it is impossible not to presume that the fact must have been communicated in this case also. The observations of Lord *Denman* C. J. in that case, therefore, apply most forcibly here:—"It is said that admitting parol evidence to explain such an order of sessions will be inconvenient; but supposing the inconvenience were greater than any I can see in this case, injustice is the greatest of inconveniences; and when an order of removal has been discharged, not on the merits, but on other grounds, it would be great injustice if it could be set up as a decision on the merits, by a party who knew that they had not been inquired into." As to the hardship on the appellants, of having to come again and again to the sessions, it is clear

(a) 4 N. & M. 215; 2 A. & E.

250.

(b) 6 T. R. 613.

(c) 2 Str. 1256; Burr. S. C. 261.

(d) 2 N. & M. 289; 5 B. & Ad.

526.

that they might always obtain costs on the order being quashed.

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First point.

Lord DENMAN C. J.—I am of opinion that the sessions were quite right, in both the conclusions they have come to. The first point made is, that the statement of the grounds of appeal was inadmissible, because the appellants had precluded themselves from tendering it, by having previously given a notice of appeal, signed by a greater number of parish officers. But it seems clear to me that the appellants were not so bound by the way in which the notice of appeal was signed, and as the very objection was raised at sessions, we must take it that an explanation was given, which was perfectly satisfactory, as the justices allowed the appeal to go on. Nothing in fact is stated in the case to shew that those who signed the statement of grounds of appeal, were not both in fact and law the proper persons so to do. On this point it seems impossible to come to any other conclusion.

Then it is said that the rule of law which makes an order of sessions conclusive between the two litigant parishes, is not applicable here, inasmuch as the order was quashed on an application of the respondents themselves, who had discovered some defect in the statement of their case, and we are referred to certain decisions as guides on the subject. I do not think, however, I shall interfere with any thing that has been laid down either by myself or other judges, in arriving at a different conclusion here. For in those cases there was either an express decision of the sessions, pointing out the special grounds on which their judgment proceeded, or as in the last case cited, *Rex v. Wick St. Lawrence (a)*, there was what was equivalent to it, a quashing of the order by consent of the parties, the point on which it was quashed being expressly made known to the other side. Can it be even said here that the sessions did not quash this order on the merits; all that can

Second point.

(a) 2 N. & M. 289; 5 B. & Ad. 526.

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be gathered from the facts stated is, that the respondents found some deficiency in the facts to support their case, and upon that they procured their order to be quashed.

If on an appeal being decided in this manner, we should hold that evidence was admissible to shew that it was not decided on the merits, what a door we should open to injustice, for the respondents might get their order quashed again and again, and at last contend that the case had never been decided on the merits. The appellants, by such a course, would naturally be misled, for if this could be done once, it could be done twenty times, and then when the appeal came on to be heard, the question would be, whether the case had been previously decided on each occasion on the merits or not, the great inconvenience of which is obvious. In this case, in my opinion, the sessions were quite right in the decision they came to, that their former order was conclusive, because, on looking at the statement of the grounds of appeal, it is quite clear that the parties went to try the same question on both occasions; there could be no doubt, therefore, what the point to be tried was. I think, therefore, in every point of view, the sessions were quite right, and that when an order of removal is quashed, it is binding and conclusive, unless the opposing party is protected and put on his guard, by being told that the appeal is to be quashed on some special ground, apart from the merits of the case.

PATTESON and WILLIAMS Js. concurred.

COLERIDGE J.—I should not have added a word to what has fallen from my lord, had it not been that for some time I entertained a different opinion, which, however, was entirely altered by the argument for the appellants. I thought that the rule of law, admitted on both sides, applied in this case, namely, that though an order of sessions, quashing an order of removal, is conclusive on both parishes when decided on the merits, evidence is admissible to shew that it was quashed on some special ground. But the facts

here shew, I think, that it was not quashed on any point of form. The order of removal was a perfectly good order on the face of it, but the respondents finding themselves unprepared with part of the evidence to support that removal, apply to quash the order; and the sessions quash the order generally. That decision must be taken to be a quashing on the merits, just as a nonsuit disposes of the merits of a case at *nisi prius*. I therefore agree in thinking that the sessions were right.

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Order of Sessions confirmed.

Order of Justices quashed.

The QUEEN v. WATTS.

Wednesday,
Nov. 8th.

UPON an appeal against the account of *George Watts*, assistant overseer of the poor of the parish of Slembridge, in the county of Gloucester, entitled "An account of disbursements of *George Watts*, assistant overseer, from 6th April, 1834, to 6th April, 1835;" and containing, amongst other things, the following items:

Paid six months pay for maintenance of the poor,
as per contract, 29*l.* £174
Paid for six months pay for maintenance of the
poor, as per contract, 39*l.* £234

The Court ordered the said items to be struck out of the account, subject to the opinion of His Majesty's Court of King's Bench on the following case. It appeared that the said *George Watts* was assistant overseer of the poor for the parish of Slembridge from the 6th April, 1834, to the 6th April, 1835, and executed all the duties of an overseer of the poor. On the 2nd of April, 1835, at a

1. Appeal lies against the accounts of an assistant overseer.

2. The next quarter sessions for appealing against an overseer's accounts, are the sessions after the accounts have been published and deposited with the parish officers for public inspection. Thus, when the accounts of an overseer were examined and allowed at vestry on April 2, and by two justices on

April 3, but were not delivered by the overseer to his successor till May 8:—Held, that the next sessions after May 8, were the proper sessions to appeal to.

3. *Quere*, whether an affidavit from an appellant is receivable at hearing of the appeal, stating the time at which he first had knowledge of the accounts.

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vestry meeting duly held, the said account of the said *George Watts* was examined and allowed by *James Cornock* and *John French*, churchwardens, *George Greening*, overseer, and by *William Ludlow*, *James Smith*, and *John Bailey*; and on the next day, being Friday, the third of the same month, the said account was submitted to two justices of the peace for the said county, at a special sessions holden at Wootton-under-Edge for that purpose; and was by such justices signed and allowed. The said *George Watts* did not, however, deliver over his said account until the 8th of May following, when he delivered it in vestry to the churchwardens, and the person who had been appointed assistant overseer to succeed him. An affidavit of the appellant (who was a rated inhabitant of the said parish), sworn in Court, was put in, and after objection by the counsel for the respondent to its admissibility, was received by the Court. By this affidavit, it appeared that the appellant had no actual knowledge of the said account until the 23rd of April, 1835. The Easter sessions for the said county, if they had been holden according to the ordinary course, would have commenced upon Tuesday, the 7th of April; but in consequence of the assizes they were held on Tuesday, the 14th of April, by an order made pursuant to the act of the 4 & 5 Will. 4, c. 47. By the rules of the quarter sessions for the said county notice of trial of an appeal must be given on or before the Tuesday in the week preceding the sessions; and, consequently, the last day for giving such notice for the said Easter sessions so held as aforesaid was Tuesday, the 7th of April aforesaid. No notice of appeal against the said account was given for, nor was any appeal entered at the said Easter sessions, but notice was duly given for the Trinity sessions holden in the month of June following. The questions for the opinion of the Court are, 1st, Whether, upon the evidence, the appeal was brought in due time; 2ndly, Whether an appeal lies against the account of an assistant overseer.

W. J. Alexander and Greaves, in support of the order of sessions. It is necessary to discuss the second question first in order, namely, whether an appeal lies at all against the accounts of an assistant overseer. The office of an assistant overseer is created by the 59 *Geo. 3*, c. 12, s. 7; and that section authorises the assistant overseers "to execute all such of the duties of the office of overseer of the poor as shall in the warrant for his appointment be expressed in like manner, and as fully, to all intents and purposes, as the same may be executed by any ordinary overseer of the poor." The case states that the defendant executed all the duties of an overseer; it must therefore be implied that the Court below inspected the warrant appointing him, which would specify his duties. In *Bennet v. Edwards* (a), when that case first came before the Court, it was decided that an assistant overseer was not liable to the penalties imposed by the 17 *Geo. 2*, c. 3, s. 3, unless it appear from the nature of his appointment that he was bound to perform the duties enjoined in that section. But when the case came before the Court again, after a second trial (b), at which it was found what the duties of an assistant overseer were, it was held that the Court above would presume that such duties were enjoined in the warrant of appointment. *Littledale J.* said, "We are bound to presume, after verdict, that the defendant was proved to be such an assistant overseer as made it his duty to produce the rate to the plaintiff." *Batcheldor v. Hodges* (c) is a still stronger authority to the same effect. At all events, it is not open to the defendant to contend that it was not his duty to discharge this part of the office of an overseer; for he has himself delivered in the account of payments made by him as assistant overseer, and has therefore shewn himself to be acting as a public officer; which is all that is necessary to be proved, to shew that he filled such charac-

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First point:
An appeal lies
against the
account of an
assistant over-
seer.

(a) 1 M. & R. 482; 7 B. & C. 586. (c) 6 N. & M. 79; 4 A. & E.

(b) 8 B. & C. 702; confirmed 592.
on error, 6 Bing. 230.

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ter, *Rex v. Gordon* (a). The question, therefore, is, whether, on the proof of this defendant having performed all the duties of an overseer, the 17 *Geo.* 2, c. 38, s. 4, which gives an appeal against the accounts of overseers, does not apply to the accounts of assistant overseers. The accounts mentioned in that section are the same as those in s. 1, and are the accounts which the defendant delivered in, in pursuance of the provisions of the statute. *Rex v. Great Faringdon* (b) shows, that when any person is appointed by statute to discharge the duties of an overseer, (as a guardian of the poor, for instance, under 22 *Geo.* 3, c. 83), the provisions of 17 *Geo.* 2, c. 38, apply to him. That case therefore decides the first point.

Second point:
 The appeal
 brought in due
 time.

The 17 *Geo.* 2, c. 38, s. 1, requires churchwardens and overseers, within fourteen days after their successors are appointed, to deliver to them their accounts in writing. Sect. 4 requires the appeal against such accounts to be made to the next general or quarter sessions; and the 50 *Geo.* 3, c. 49, s. 1, after reciting the above statute, directs the accounts submitted by the overseers to be laid before two justices of the peace, at a special sessions to be held within the fourteen days mentioned in the last act. In this case the accounts were laid before two justices on the 3rd of April, and the quarter sessions were held by order under the 4 & 5 *Will.* 4, c. 47, on the 14th of April; but the defendant did not deliver his accounts to his successor till May 8th. It was from that day, therefore, that the time for appealing began to run; and therefore the appeal to the Midsummer sessions was in time. The delivery of the accounts fixes the time for appealing like the publication of a rate: this is proved by the *King v. Thackwell* (c), where overseers' accounts were allowed by the justices on the 27th March, and the quarter sessions were held on the 10th April; but the accounts not being delivered to the new overseers till the day of the quarter sessions, it was held that an appeal against them

(a) Leach, C. C. 337, in notis.

(c) 6 D. & R. 61; 4 B. & C. 62.

(b) 9 B. & C. 541.

at the Midsummer sessions was entered in time. So, in *The King v. The Justices of Dorsetshire* (a), where the allowance by the justices was on the last day on which an effectual appeal could be made to the next sessions; as it did not appear that the appellant had notice of the allowance, an appeal to the subsequent sessions was held to be in time. All the cases on sections of this nature shew that the next practicable sessions is all that is intended by the legislature. *Rex v. Monmouthshire* (b), and *Rex v. Southampton* (c), prove this proposition; and the facts found here shew that the present case is not within *Rex v. Pem-brookshire* (d), where the appellant had notice in time to have brought his appeal at a previous sessions.

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J. Talbot, contra. I. An appeal against the order of jus- First point.
 tices is *stricti juris*; and only arises by an express enactment of the legislature. This appears clearly from *Rex v. The Justices of Surrey* (e), and *Rex v. Hanson* (f). The appeal in this case lies against overseers' accounts, by virtue of the 17 Geo. 2, c. 38, s. 4; but the office of an assistant overseer was not created till long after, by the 59 Geo. 3, c. 12. The Court, therefore, will not extend the penalties of a preceding statute to an officer clearly not contemplated by the legislature. It is said that no remedy can be had against an assistant overseer, if the Court decide against the appeal lying; but there is nothing to prevent an appeal being brought against the overseers, for *Cannell v. Curtis* (g) shews that the accounts of an assistant overseer are the accounts of the overseers. If the accounts are improperly kept by the assistant overseer, he may be proceeded against by the overseers. [*Coleridge J.* He is not their servant; he is appointed under the 59 Geo. 3, c. 12, s. 7, by the parish.] By law, the overseers have the

(a) 15 East, 200.

(e) 2 T. R. 504.

(b) 3 Dowl. P. C. 306.

(f) 4 B. & Ald. 519.

(c) 6 M. & S. 394.

(g) 2 Bing. N. C. 228.

(d) 2 East, 213.

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charge of the poor of the parish; and *The King v. The Justices of Norfolk* (a) shows, that, although a parish officer, through age and infirmity, has not interfered in the collection of the rates, he is compellable to deliver in an account under the 17 *Geo. 2*, c. 38, s. 2. Under that section two justices of the peace may commit to the common gaol any overseer for refusing to deliver up his accounts; and the 50 *Geo. 3*, c. 49, s. 1, contains a similar enactment. Do these provisions also extend to an assistant overseer? *Bennett v. Edwards* (b) has been referred to, but that case was decided on the 17 *Geo. 2*, c. 3, which contains peculiar words; for the enactments related to churchwardens and overseers, or *other* persons authorised to take care of the poor; and it was held that the assistant overseer in that case was proved to be a person authorised to take care of the poor, and that he was therefore within the very terms of the statute. This was held to be the effect of *Bennett v. Edwards* (b) when the case was discussed in *Whitchurch v. Chapman* (c). In this case the assistant overseer is neither within the terms nor the necessity of the 17 *Geo. 3*, c. 38. *The King v. Farrington* (d) has no bearing on the present case, except for the arguments of counsel.

Second point.

II. As to the time of the appeal, *The King v. Worcestershire* (e) is a decision on this statute, that the appeal must be to the next quarter sessions, after the allowance of the accounts. If it had been considered that there was not sufficient time to go on with it, it might have been entered and respited. *The King v. Colchester* (f) shews that the time of appeal does not run from the delivery of the accounts; for there the appeal was made after the accounts had been allowed by two justices, pursuant to 17 *Geo. 2*, c. 38, but before they had been examined at a special sessions, in pursuance of the 50 *Geo. 3*, c. 49; and it was held that the appeal run from the time of the first allow-

(a) 4 B. & Ad. 238.

(b) 7 B. & C. 586; 8 B. & C. 702;
 S. C. in error, 6 Bing. 230.

(c) 3 B. & Ad. 691.

(d) 9 B. & C. 541.

(e) 5 M. & S. 457.

(f) 5 B. & Ald. 535.

ance. *Rex v. Southampton* (a) also points out the day from which the time for appealing is to be reckoned. In *The King v. Herefordshire* (b), where an order of removal was executed three days before the quarter sessions, the Court held that the appeal ought to have been made to those sessions, although it could not have been tried there. That case is not reconcileable with *Rex v. Thackwell* (c), in which it appears from the report that there were ten days between the allowance and the holding of the quarter sessions; but it is understood, from counsel in the case, that at the sessions where *Rex v. Thackwell* (c) was tried ten days' notice of trial was required; and that explanation will reconcile it with the other cases. [*Patteson J.*—There are several subsequent cases which overrule *Rex v. Herefordshire* (b).] The ruling latterly certainly has been to construe next sessions, next practicable sessions, *Rex v. Justices of Essex* (d), *Rex v. Justices of Kent* (e), and the cases collected in the note to that case.

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Lord DENMAN C. J., on a subsequent day in this term, delivered the judgment of the Court:—Our opinion is asked by the sessions on three points: 1. Whether an appeal lies against the account of an assistant overseer; 2. Whether the notice of appeal was given in due time; 3. Whether the appellant's affidavit was properly received by the sessions, to prove at what time he became acquainted with the allowance of the accounts by two justices of the peace.

On the first point we see no reason to doubt that an as- First point.
 sistant overseer's account may be the subject of an appeal. He is not the servant of the churchwardens and overseers of the parish, but of the vestry, from whom he directly receives his authority; an authority which may indeed be limited by the warrant of appointment; but which does not appear to have been limited in the present case.

(a) 6 M. & S. 394.

(d) 1 B. & Ald. 210.

(b) 3 T. R. 504.

(e) 8 B. & C. 639.

(c) 6 D. & R. 61; 4 B. & C. 62.

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Second point.

The second point may admit of some difference of opinion, but seems capable of being decided on principles of reason and convenience. Some cases have held that the time of allowance by the justices is that from which the time for giving notice must be calculated, *Rex v. Coodo*(a), *Rex v. Worcestershire*(b). The language of some others may be thought to import that every parishioner's right to appeal is kept alive as long as he is personally ignorant of the fact of such allowance. A strict adherence to either of these rules might obviously produce injustice; nor do we think that the cases, when fairly considered with reference to their circumstances, lay down either the one or the other. On the contrary, the Court must on those occasions have had the words of the stat. 17 Geo. 2 in their contemplation; which gives the right of appeal to the party grieved "giving reasonable notice" to the *next* general or quarter sessions of the peace. The sessions have therefore to adjudge what notice is reasonable; which must depend on their usual practice. Still the word *next*, applied to the sessions, requires an interpretation; next to what period? Not to the period of examination by the vestry before allowance, because the justices upon their investigation, and before allowance, may have struck out every item to which parishioners feel an objection;—not to the allowance itself, because it may be unknown to all the parties interested;—nor to the fact of knowledge by any one disposed to appeal, because that would lead to an inconvenient inquiry into the particular knowledge of individuals, and might keep the officer's account subject to an appeal indefinitely. The only other period to which recourse can be had for this purpose is that when the parish had the opportunity of knowing the contents of the account. Thus, in *Rex v. Thackwell*(c), the time for *giving notice* was held to be properly reckoned from the time when the account was allowed *and published*. We think it may be

(a) Cald. 464; 1 Bott, 281.

(c) 4 B. & C. 67; 3 D. & R. 61.

(b) 5 M. & S. 457.

correctly described as published at the time when it is deposited (according to the 1st sect. of 17 Geo. 2) with the churchwardens and overseers for public inspection, and the fact of depositing *bond fide* made known. In the present instance, the sessions have found that this was done on the 8th of May. Therefore the June sessions, when the appeal was lodged, were the next sessions; and the notice was in due time. This makes it immaterial to inquire whether the appellant's affidavit of the time when he knew of the account was properly admitted; because the inquiry was completely immaterial. The Court was consequently justified in entering on the merits of the appeal; and, having disallowed certain items, the rule for setting aside their judgment must be discharged.

Order confirmed.

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The QUEEN, on the prosecution of Mr. JOHN CLARK, v. Sir ROBERT BAKER, Treasurer of the County of Middlesex.

Saturday,
Nov. 11th.

IN Michaelmas term, 1833, a rule nisi was obtained against the defendant, as Treasurer of the County of Middlesex, calling on him to shew cause why a writ of mandamus should not issue, directed to him, commanding him to pay to *John Clark*, gentleman, as Clerk of the Session of the delivery of the king's gaol of Newgate, the sum of 916*l.* 7*s.* 4*d.*, for convicts capitally convicted and pardoned on condition of transportation or imprisonment; convicts sentenced to be transported, and convicts sentenced to be

1. The clerk of the session of gaol delivery of Newgate is not entitled to any fee in respect of convicts sentenced to imprisonment with hard labour.

2. He is entitled to the fee usually

paid, at the time of the passing the 5 Geo. 4, c. 84, in respect of convicts sentenced to transportation.

3. The clerk of the session of Newgate, who continued in office up to 1780, received the sum of 6*s.* 2*d.* for every felon ordered to be transported; his successor in office received the same fee till the year 1805. From that year till the year 1829, when his successor was appointed, he received no such fee:—Held, that the non-payment of the fee during this period, unexplained in any manner, did not preclude the clerk of the session from making a claim for the fee usually paid, under the 5 Geo. 4, c. 84, s. 4, and the Court granted a mandamus, in order to ascertain whether any fee was usually payable at the time of the passing of that act.

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imprisoned and kept to hard labour in the House of Correction instead of transportation, at the general sessions of the delivery of the king's gaol of Newgate, holden for the county of Middlesex, in the years 1831 and 1832. On the coming on of the above rule, it was ordered, that the matters in dispute should be put into a special case for the opinion of the Court.

The case set out very fully the various acts relating to transportation, commencing with the first act on the subject, the 4 *Geo.* 1, c. 11. By the 55 *Geo.* 3, c. 156, the laws relating to convicts subject to transportation were amended, and were continued to the 1st May, 1816; and by sect. 3 it was enacted, "that the clerk of assize, clerk of the peace, or other clerk of the court, should be paid by the treasurer of the county *the same fee as had been usually paid*, or such clerk of assize, clerk of the peace, or other clerk of the court, was entitled to receive for the order of transportation of any offender." The 4th sect. of 56 *Geo.* 3, c. 27, (passed 30th April, 1816,) contained an exactly similar provision; and the provisions of this act were continued by the 1 & 2 *Geo.* 4, c. 6, which remained in force down to the passing of the 5 *Geo.* 4, c. 84.

The 5 *Geo.* 4, c. 84, consolidated the laws relating to transportation; and sect. 21 enacted, "that all *such fees*, on the delivery out of custody of any offenders ordered to be transported or removed, as *have usually been paid* to the sheriff or gaoler, and all reasonable expenses which the sheriff or gaoler shall incur in every such removal, shall be paid by the county or place for which the court in which the offender was convicted shall have been held, and the sheriff or gaoler shall receive the money due for such expenses from the treasurer of such county or place, such fees and expenses being first allowed by the order of the justices of the peace at their quarter or other general sessions of the peace, who are thereby required to make such order as shall be just in that behalf: and the clerk of the court shall be paid by such treasurer the same fee as *hath*

been usually paid, and he is lawfully entitled to receive, for every order of transportation. Prior and down to February session, 1784 (inclusive), the clerk of the session of gaol delivery of Newgate received, in respect of every capital convict reprieved on condition of transportation, and for every felon sentenced to transportation, a fee of 6s. 2d., which sum was regularly paid to him by the contractors for the transportation of the convicts; but there is no evidence to shew that since that period any fee in respect of such convicts has been paid to him.

The first statute relating to punishment by hard labour was the 5 *Ann.* c. 6. Sect. 2 enabled the judge or justices before whom offenders should be tried and convicted of theft or larceny, to sentence such offenders to hard labour. This statute made no provision for any fee whatever to the clerk of the court or other officer. By the 16 *Geo.* 3, c. 43, the power of sentencing to hard labour was extended to other offences; and by sects. 3 and 12, the clerk of assize, &c. was directed to give to the gaoler a certificate as to the felons, &c. convicted and sentenced to hard labour. Sect. 17 enacted that the clerk of assize should be paid by the treasurer of the county the like satisfaction as had been usually paid for the order of transportation of any offender. The provisions of this act were extended by the 19 *Geo.* 3, c. 74, and the power given by it (so far as it authorized the courts to sentence to hard labour, in the place of transportation, convicts liable to transportation, and convicts capitally convicted, and reprieved on condition of being kept to hard labour,) was continued, by several statutes, to the 26th March, 1802, when it ceased. From that time the sentences to hard labour were under the 5 *Ann.* c. 6, and 53 *Geo.* 3, c. 162, until the passing of the 7 & 8 *Geo.* 4, c. 29. But since 1802 certificates of the convictions of persons sentenced to hard labour, containing particulars similar to those required by the 16 and 19 *Geo.* 3, have been made by the clerk of the court, and transmitted to the House of Correction with prisoners sentenced to hard labour there.

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In 1778 Mr. *Deacon*, then clerk of the session of the delivery of the king's gaol of Newgate for the county of Middlesex, obtained a rule for a mandamus, which was afterwards made absolute, directed to the treasurer of the county of Middlesex, to pay such and the like fees and satisfaction for the persons convicted of felony and other offences, at the Old Bailey, in 1776, 1777, and 1778, and sentenced to hard labour, as had been usually paid by the contractors for the transportation of felons. 'This rule was obtained upon an affidavit of Mr. *Deacon*, which stated, that from the time of his appointment to the 16 Geo. 3, c. 43, he had always been paid by the contractor, for the transportation of felons, the fee of 6s. 2d. for every felon ordered to be transported, and that the persons who had been convicted, and for whom he claimed fees, were liable to transportation, but had been sentenced to hard labour under the provisions of the last-mentioned statute.

The fees so claimed by Mr. *Deacon* were paid to him by the then treasurer of the county of Middlesex, in consequence of the granting of the above-mentioned rule; and the like fees were continued to be paid by the said treasurer to Mr. *Deacon*, and to Mr. *Shelton*, his successor in office, until about the beginning of the year 1805. Upon the death of Mr. *Shelton*, in 1829, the said *John Clark* was appointed clerk of the session of gaol delivery of Newgate.

The case concluded with the following questions for the Court :

Whether the clerk of the session of gaol delivery of Newgate is entitled to a fee of 6s. 2d. in respect of each person capitally convicted, and pardoned on condition of transportation—of each person capitally convicted, and pardoned on condition of imprisonment with hard labour—of each felon sentenced to transportation—and of each felon liable to transportation and sentenced to be imprisoned and kept to hard labour—or of either, and which class of offenders.

The following were the points delivered by the defendant to the prosecutor, as intended to be relied upon in argument :

I. As to transports. That at the time of passing the stat. 5 *Geo.* 4, c. 84, the clerk of the court had not been usually paid, and was not entitled to receive any fee on order of transportation.

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II. As to convicts sentenced to imprisonment with hard labour. That since the expiration of the 19 *Geo.* 3, c. 74, (in 1802) such sentences have been under the statute of 5 *Ann.* c. 6, and 53 *Geo.* 3, c. 162, and 7 & 8 *Geo.* 4 (commonly called *Peel's Act*), and subsequent acts, none of which acts give any fee to the clerk of the court for an order of imprisonment with hard labour,—no such fee in fact having ever been paid or payable under any other acts than 16th and 19th *Geo.* 3.

Sir *W. W. Follett* (and *Channell* was with him) argued the case for the crown; and on the second point *Fleetwood v. Finch (a)* was cited.

Sir *F. Pollock* (with whom was *Addison*) was heard for the defendant on the first point, being stopped by the Court on the point as to Mr. *Clark's* right to fees in respect to convicts sentenced to hard labour (*b*).

LORD DENMAN C. J.—With regard to the fee on convicts sentenced to hard labour, we feel no doubt that it cannot be claimed any longer. The services required from the clerk of assize, in respect to such sentences under the statutes, for which the fee was payable, ending with the 19 *Geo.* 3, c. 74, are no longer required to be performed; and although some inconvenience may be caused by those services being discontinued, we think the remedy can only be supplied by another act of parliament.

As to the other point, some difficulty is occasioned by the combination of provisions in the 5 *Geo.* 4, c. 84, varying

(a) 2 H. Bl. 220.

(b) As the arguments of counsel proceeded entirely on the con-

struction of the different acts of parliament, it has been deemed unnecessary to give them.

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in some respects the enactments of the former statutes, and substituting others in their place; for by the 21st sect. it enacts, "that the clerk of the court shall be paid the same fee as hath been usually paid, and he is lawfully entitled to receive, for every order of transportation." On considering the general meaning of these words, they clearly import that some fee should be given; and there is nothing unreasonable in holding that the fee usually given should be paid. At present I do not know what fee is payable, or under what circumstances the fee usually paid formerly has been discontinued; but I cannot think the single circumstance of an officer having abstained from the receipt of this fee for a period of forty years, is by itself sufficient evidence of the fee not being usually paid in the words of this act of parliament, or such a fact as to preclude his successor in office from claiming the fee he was of right entitled to. The officer in question might have been a rich man, to whom the fee might have been of no consequence, and if so, it would be very hard that his acts should bar the rights of a new-comer. On the other hand, it may turn out that the fee was withheld on account of other advantages which were extended to the clerk of the session, and which would therefore make the fee one not usually paid at the time of the passing the act. On the whole, these circumstances make the case eminently fit for the mandamus going, in order to institute further inquiry.

PATTESON J.—I quite agree as to the fee claimed on the sentences to hard labour. That fee was payable for duties performed under various acts of parliament; but from 1802 downwards there has been no provision on the subject. Whether this omission was unintentional or designed, it is difficult to say, but as it exists, it is impossible to hold *Mr. Clark* to be entitled to that fee; and therefore so much of the rule as claims it must be discharged.

On the other point there is great difficulty. As to the fee which the clerk was *lawfully* entitled to receive, there

is no difficulty at all; for certainly in 1780 he was entitled to a fee, and the clerk at that period actually did receive it for some years. His successor therefore in office was entitled to receive it; for he could not be deprived of any fee he was entitled to by the neglect or act of a former officer. But then comes the question as to the meaning of the "fee usually paid." It cannot mean the payment of the fee for three or four years, as it was to Mr. *Shelton's* predecessor, but the fee that had been paid for a long course of years. Then, does the non-receipt of it by an officer for forty years exclude his successor from his right to it? This would be rather a startling position to lay down. It is quite clear that the act intended that the clerk should be paid a fee on transportation, and there is no doubt here as to the amount, for that has never varied. The only question therefore is, as to the *usual* payment, which must be inquired into.

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WILLIAMS J.—I think that *Fleetwood v. Finch (a)* completely disposes of the claim to fees on convicts sentenced to transportation, as it shews that such a fee can only be founded on ancient usage or act of parliament. Ancient usage is out of the question here, and the present act of parliament is silent on the subject.

On the other point, I think that the mandamus ought to go, in order to have the circumstances explained under which Mr. *Shelton* forbore, for so long a period, to claim the fee he was entitled to. I do not think that such forbearance is by itself a complete answer to the claim for the "fee usually paid," and the case put by my lord shews how it may be explained. To maintain such a proposition, it must be contended that the abstaining to receive the lawful fee for any number of years precludes the holder of the office from asserting his claim to it.

COLERIDGE J.—It is not disputed that the fee taken by an officer like Mr. *Clark* must rest on the principle laid

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down in *Fleetwood v. Finch*(a), viz. on ancient usage or act of parliament: for work done, is not by itself sufficient. Ancient usage cannot be relied on in this case on the sentences to hard labour, for that punishment only dates from the 5 Ann. c. 6. The subsequent acts of parliament which entitled the officers to a fee on such sentences, dropped on the enactment of the 7 & 8 Geo. 4, c. 28, and that act says nothing of any such fee being paid. Therefore as the statutes entitling the clerk to such fee are expired, and there is no ancient usage, the foundation for the claim fails.

I quite agree also on the other point. It is not disputed that the officer was entitled to the fee at the passing of the 5 Geo. 4, c. 84. The question is then, are the words, "the same fee as hath been usually paid,"—so clear and unambiguous, that we ought not to put the case in a course for additional inquiry? It may turn out that the words "usual payment" may receive an interpretation from the practice of other courts, and if the traverse be taken upon those words, the jury may take into consideration the grounds upon which Mr. *Shelton* discontinued to receive the fee. All these circumstances shew that the writ ought to issue (b).

Rule absolute for a mandamus as to the fee on convicts sentenced to transportation—

Discharged as to the fee on convicts sentenced to hard labour.

(a) 2 H. Bl. 220.

(b) Where "a title is once gained by prescription or custom, it cannot be lost by interruption

of the possession for ten or twenty years." Co. Litt. 114 b, and two cases there cited.



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The QUEEN v. The Inhabitants of HOCKWORTHY.

Saturday,
Nov. 11th.

UPON an appeal against an order of two justices, whereby *Elizabeth Thorn* was removed from the parish of Hockworthy, in the county of Somerset, to the parish of Chipstable, as the place of her last legal settlement, the sessions quashed the order, subject to the opinion of this Court on the following case:—

A notice of appeal and of the grounds of appeal had been duly served by the appellant parish. The grounds of such appeal were as follows: (namely,) That *John Thorn*, deceased, (the late husband of the said *Elizabeth Thorn*) was legally settled in the parish of Bampton, in the said county of Devon, by renting of one Mr. *Robert Elsworthy* certain lands and hereditaments situate in the said parish of Bampton for a year from Lady-day, 1830, at a rent of upwards of 10*l.* a-year, and that he occupied the same for a year and paid a year's rent for the same; and that the said *Elizabeth Thorn*, the widow of the said *John Thorn*, is therefore legally settled in the said parish of Bampton.

When the above notice had been read at the trial of this appeal, it was contended by the respondents, that, looking at the terms of it, they had received no notice to prove the settlement in the appellant parish, and that the appellants were bound to prove the settlement in Bampton, to which alone the statement of their grounds of appeal was confined. The Court, however, called upon the respondents to support their order by proving the settlement (as stated in their examination in the appellant parish). The respondents objected to the right of the appellants to cross-examine the

interests, some of which are incorporeal tenements, at one fixed rent, stamp is sufficient.

1. It is not necessary for the respondents to give evidence of the settlement on which they removed the pauper unless the appellants have pointed out an objection to it in their grounds of appeal.

2. Where there is a demise of land and other things at a fixed rent, and the sessions find that the land alone is worth 10*l.* a year, a settlement may be gained by occupation under the demise, and the instrument is not void, although it attempt to demise incorporeal tenements by writing not under seal.

3. Where an instrument demises several matters, consisting of land and other

an *ad valorem*

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witness on this part of the case (under the terms of their notice). The Court held that they were entitled to cross-examine, and they did so. The respondents attempted to prove a settlement in the appellant parish by hiring and service, which, in the judgment of the Court, they failed to substantiate. The appellants then attempted to establish a settlement of the pauper through her late husband by reason of his renting a tenement (as stated in their notice) in the parish of Bampton, and tendered in evidence an instrument, signed by the pauper's husband and one *Robert Elsworthy*, of which the following is a copy:—"Memorandum of agreement made the 24th day of March, 1830, between *Robert Elsworthy* of Bampton, in the county of Devon, yeoman, of the one part, and *John Thorn* of Chipstable, in the county of Somerset, of the other part, witnesseth, that the said *Robert Elsworthy* doth let unto the said *John Thorn* a dairy consisting of ten cows and ten living calves to be all in pail by the 1st of May, or 3s. 6d. per week to be allowed for the deficiency of each or either of the said cows after the 1st May; and if any or either of the said cows should fail by loss of milk or misfortune, after seven days' notice has been given, to be exchanged for another, or satisfaction made for such loss; also the kitchen, back kitchen, dairy, two bedrooms, (except as hereinafter excepted) also sufficient lincharges, pigsties, and other appurtenants which has been usually let with the said dairy, together with the north part of the garden, and 120 perches properly manured and cultivated for potatoes, and twenty-five faggots of wood to be delivered in court for each cow, with liberty of cutting browse at the said *Robert Elsworthy's* appointment, to be found a horse one day in a week when barrelling of butter, and one day a fortnight when not barrelling. The pigs to run in the east part of the orchard until the apples are deemed necessary to be saved, and then in the Gorney until the apples are taken in, and to be kept well ringed to prevent their doing damage; and also to have certain plots of ground

called Great South Moor Cross Park, Gorney Middle Castle, and West Castle, and the first fortnight keep in the South Castle. Also the pasture of the Home Meadow after the hay is carried off until the first day of November, 1830, the pasture of the West Meadow until the 20th day of November, and the pasture of the Lower Meadow until the 25th day of December, 1830; the said Lower Meadow to be unstocked when very wet, and to help mow, and make the hay in the said meadows free of expense, except being found meat and drink; the hay to be put in one rick, and divided into three parts, two of the three parts to be for the use of the said cows, one of which two parts to remain unconsumed at Lady-day, 1831, and to keep the windows properly glazed, and so to leave the same at the end of the term, except what glass the said *Robert Elsworthy*, or family breaks; in consideration of the said *John Thorn*, his executors, administrators or assigns paying unto the said *Robert Elsworthy* the sum of 75*l.*, the first quarter's rent to be paid on or before the 24th day of June; the second payment at Michaelmas; the third payment at Christmas; and the fourth payment at Lady-day, 1831, being the end of the term. Also the said *Robert Elsworthy* reserves liberty of the fire-place in the kitchen with a friend or his servants when required, and also to dress all meat and vegetables that might be wanted, and the chamber over the back kitchen, and liberty of his servant girl sleeping in one of their bedrooms. And also the said *John Thorn* or his attendants to dress all meat and vegetables when wanted, the servant girl to assist; also half of the poultry and eggs, the hearth ashes to be at the disposal of the said *Robert Elsworthy*; the cows to be put to bull so as to calve by the 25th of March, 1831, and if any or either of the said cows should not go to bull, to be at the disposal of the said *Robert Elsworthy* the 2d day of February, 1831; the said *Robert Elsworthy* to find all firing for his use in the kitchen, the cows to be kept on straw before they have calved during the winter, also to

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have half of the poultry and eggs, and liberty of running pigs with the said *John Thorn*, who is to keep fence for his own pigs and to attend to all stock on the said farm in the absence of the said *Robert Elsworthy*, the parting in the orchard to be kept at a joint expense; the said *John Thorn* to work for 1s. and liquor when required. and to quit at the end of the year without any further notice, unless otherwise agreed on. In witness whereof the parties have hereunto subscribed their names. *Robert Elsworthy, John Thorn.*

Witness, *John Capron.*"

The above instrument was stamped with a 1*l.* 10*s.* stamp, and the pauper's husband occupied under it the premises referred to therein for above a year, and paid to the amount of 75*l.* reserved by it. The respondents objected, 1st. That the stamp was insufficient; and 2d. That the instrument purported to be a demise of incorporeal hereditaments, and should, therefore, have been under seal. The questions intended to be submitted to this Court are, 1st. Whether, looking at the terms of the notice of appeal the Court of Quarter Sessions were right in requiring the respondents to prove a settlement in the appellant parish, and whether the appellants were entitled to cross-examine witnesses called for such purpose. If the Court should be of opinion that the sessions were right in that respect, the order of removal to be quashed. If the sessions were wrong in that respect, the order of removal is to be confirmed, unless this Court should be of opinion that the settlement in Bampton was proved in reference to the two following questions, and in that case the order of removal is to be quashed; (that is to say), 2d. Whether the instrument before mentioned was properly stamped so as to be admissible in evidence; 3dly. Whether a settlement was gained by occupying under that instrument the premises mentioned in it, and by paying the 75*l.* per annum reserved by it.

Bere, for the appellants. The first question stated by

the sessions is of great importance for the regulation of the practice at quarter sessions, as at present a difference prevails ; for at some sessions the respondents are called upon to establish their case by proving the settlement stated in the examination of the pauper. It was the impression of the court from whence this case comes, that though by the 4 & 5 Will. 4, c. 76, s. 81, the respondent was limited to the grounds of removal stated in the examination, still it was the intention of the legislature that the respondents should, without any statement of grounds by the appellant, at least prove the settlement relied on in the examination—that where the appellant gave notice of appeal, without any special grounds, this was equivalent to a notice to the respondents to prove their case. The second question cannot properly be discussed, as the sessions have not found distinctly whether the land demised to the pauper for a year was worth 10*l.*, although it appeared clearly to be so.

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Terrell, *contra*, intimated that he was not aware of the facts as to the rent so as to be able to consent to an amendment.

LORD DENMAN C. J.—It is desirable that this point should be settled. We think that the appellants cannot insist on any point for quashing the order of removal that is not stated by them in their grounds of appeal. Upon the other point, the case must go back to the sessions to be restated, unless the counsel can agree now to the amendment being made.

PATTESON and WILLIAMS Js. concurred.

COLERIDGE J.—If we came to a contrary decision, appellants who had no case at all, but who meant to rely on some defect in the examination, might contend that they were not bound to deliver any statement of the grounds of appeal.

The case was accordingly sent back to sessions, and it

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doubted, that although a messuage was demised by the same agreement, the whole was void. It was not suggested in that case that one part of the demise might be separated from the other. The question then is, does this instrument contain the demise of an incorporeal tenement? In *The King v. Hollington* (a) it was held, that the ley (pasturage) of two cows at six guineas a-year was an incorporeal tenement; and Lord *Ellenborough* C. J. said, "That the case was nothing more than a common in gross." So here, the letting of a dairy is nothing more than the mere right to feed cows. The word 'pasture' has been relied upon, but that word is ambiguous; it may mean either 'pasture,' i. e. the ground itself called pasture, or *pascuum*, the feeding, as appears by Lord *Coke* (b); and he adds, the latter cannot be demanded in a *præcipe* by that name. It is impossible to say that the land itself was granted in this case. In *Mountjoy v. Terdrue* (c), which is the case cited from *Vin. Abr.*, where it is said, that a man may grant the pasture of a close for years without deed, Mr. *Viner* adds the next placitum, as abstracted from *Rolle*, "but otherwise had it been, if he had granted pasture for certain beasts." So also the liberty of cutting browze, whether it be an easement or an estover, is an incorporeal right, and should be granted by deed, *Hewlins v. Shippam* (d). *Coster v. Cowling* (e) is an authority that the stamp is not sufficient, because the instrument demises several distinct subject-matters.

Lord DENMAN C. J.—It is not necessary to consider the way in which this instrument may be construed on various contingencies that may arise. There might be a question how the rent reserved by it could be enforced, but with that we have nothing to do. We find a demise of land at more than 10*l.* a-year, which rent has been duly paid, and the land occupied for the time prescribed by the statute, and I cannot say that the instrument is void. Being so, is

(a) 3 East, 113.

(b) Co. Lit. 4 b.

(c) 14 Vin. Abr. Grant (E a), pl. 2.

(d) 7 D. & R. 783; 5 B. & C.

221.

(e) 7 Bingh. 456.

the stamp sufficient? I think it is, for it is a 1*l*.10*s*. stamp, which is sufficient if the paper is an agreement for the lease of an incorporeal tenement or a demise of lands at a rent not exceeding 100*l*. per annum.

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LITLEDALE J.—This case may be illustrated by the following instance: suppose there were a demise of freehold and copyhold land in the same lease, and that the demise as to the copyhold were void from not being made with the consent of the lord, that would not render the whole void. So in this case, there is a good demise of land of sufficient value, and a sufficient occupation of it to confer a settlement.

WILLIAMS J.—As there is in this case a demise of land *nominatim* of sufficient value, I think enough appears to gain a settlement.

COLERIDGE J.—Mr. *Terrell* does not dispute the principle of *Rex v. Pickering* (a), he only denies that it is applicable here. That principle is, that inquiry may be made as to the rent arising from each portion of the thing demised. But it is said, that it was taken for granted in *Bird v. Higginson* (b) that a demise of real property and of an incorporeal tenement by an instrument not under seal, is void altogether. I do not think that was so; but however that might be, if we were called upon to give a construction upon this instrument as between the parties, the question does not arise now. There has been sufficient occupation, which was not the case in *Bird v. Higginson* (b) and the only point is, whether there has been a demise of a tenement of 10*l*. a-year value. That also appears clearly when we apply to the case the principle laid down in *Rex v. Pickering* (a). I think that there was an attempt made to demise an incorporeal tenement by this instrument. Mr. *Bere* compared the liberty of cutting browse to the case of *Smith v. Surman* (c); but that case does not apply unless it were shown that the

(a) 2 B. & Ad. 336.

(c) 4 Mann. & Ry. 455; 9 B.

(b) 4 N. & M. 505; 2 A. & E. & C. 561.

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browse was to be cut elsewhere than on the land demised. I do not think we ought to imply that such was the intention of the parties, because it was to be cut by the appointment of the lessor. In my opinion, therefore, there was an attempt to demise an incorporeal hereditament, but, for the reasons I have given, I think it immaterial. As to the stamp, taking it either way, it was sufficient.

Order of Sessions quashed.

Tuesday,
Nov. 14th.

WILTON v. CHAMBERS.

1. An attorney who has ceased to practise, and to take out his yearly certificate, is bound to take out his certificate on procuring his re-admission; and if he fail to do so, whether he recommences practice or not, the re-admission becomes null and void.


2. When an attorney obtained his re-admission in 1823, but did not practise or take out a certificate till 1826, the Court ordered various securities, that were given to him by a client for business

SIR J. CAMPBELL, A. G., in Hilary term last, had obtained a rule, calling upon the plaintiff to shew cause why the warrant of attorney given by the defendant to the plaintiff should not be cancelled, and the several judgments at the suit of the plaintiff against the defendant vacated, and all writs of execution issued under them set aside; and the several bills of exchange and other securities given by the defendant to the plaintiff, as mentioned in the affidavits, be given up to be cancelled.

By the affidavits on which the rule was obtained, it appeared, that in the year 1826 the defendant retained the plaintiff as an attorney; and from that time to September, in the year 1831, the plaintiff carried on divers suits at law and in equity for the defendant, for which the defendant became indebted to him in a large amount, and gave the various securities mentioned in the rule.

The plaintiff's affidavit, in answer, stated, amongst other things, that he was admitted an attorney in 1810; that he first began to practise in 1813, when he duly took out a certificate, and continued to do so up to the year 1820, when he ceased to practise; and did not again take out a done as an attorney, after he had obtained his certificate in 1826, to be cancelled; for as he could not sue for work done as an attorney (not having taken out a certificate for three years after his re-admission), securities given for work in that character were illegal.

certificate until the year 1826, when he resumed business. In 1823 he obtained his re-admission, but between 1820 and 20th July, 1826, he did not directly or indirectly carry on the business, or practise as an attorney; that after he obtained his certificate in 1826, he commenced to act as attorney for the defendant; and that the various securities mentioned in the rule were given him by the defendant for business actually done by him in that capacity.

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Erle, Cresswell, Shee, and W. H. Watson, now shewed cause (a). The question is, whether Mr. *Wilton*, having failed to take out his certificate after obtaining a rule for re-admission in 1823, until the year 1826, although he did not practise as an attorney in the interval, thereby brought himself within the enactment of the 37 *Geo. 3*, c. 90, s. 31, which renders any person admitted on the rolls, who shall neglect to take out his certificate for one whole year, incapable of practising. It is submitted, that the neglect mentioned in the statute means a culpable neglect, and only applies to attornies who continue to practise without taking out a certificate. The 2 *Geo. 2*, c. 23, which requires the enrolment of attornies, only relates to attornies in actual practice; so also the statutes, which require certificates to be taken out, such as the 25 *Geo. 3*, c. 80, s. 3, and the act under consideration, 37 *Geo. 3*, c. 90, s. 30, which impose penalties on the omission so to do, expressly specify practising attornies only. The Court therefore will not extend the enacting clause of s. 31 further than to remedy the mischief contemplated in s. 26 and s. 30, and the preceding statutes. This was the view taken by *Parke B.*, in *Ex parte Jones* (b), who held that an attorney who had been admitted but never practised did not require re-admission, although he had not taken out his certificate. In *Coren v. Sharpe* (c), also, it was held that an attorney, who had be-

(a) Cor. Lord *Denman C. J.*,
Patteson, Williams, and Coleridge
Js.

(b) 2 Dowl. P. C. 451.
 (c) 1 B. & Ad. 386.

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come disqualified from practising by not taking out his certificate, was entitled to recover for business done after he had obtained a rule for re-admission, but before the re-admission was entered at the Master's office. So, in *Hilteary v. Hungate* (a), *Littledale J.* thought the decision of *Parke B.*, in *Ex parte Jones* (b), was right; but he decided the case on another ground. The legislature never intended that any one should take out the certificate, unless he was in actual practice. Sect. 26 of 37 Geo. 3, c. 90, has the express words, that every attorney, "during such time as he shall continue so to practise in any of the said Courts," shall take out a certificate; therefore, on comparing s. 31 with s. 20, the Court will not extend the penalty of a fiscal statute further than the mischief contemplated. It is true that applications are constantly made to the Court for re-admission, in consequence of a certificate not having been taken out, although there has been no practice; but these motions are only made *ex majori cautela*; just as at nisi prius evidence is frequently given because it is at hand, though, in point of law, not strictly necessary. *Ex parte Nicholas* (c) is distinguishable from the present case. There the Court of Common Pleas ruled that the admission of an attorney who had omitted to take out his certificate for a whole year, but who had never practised, was void; but the point was never raised then, whether re-admission was necessary at all. It must, however, have been distinctly present to the mind of *Abbot C. J.*, in *Ex parte Matson* (d), when he laid down that the neglect mentioned in s. 31, of 37 Geo. 3, imports culpability, and he used these words, "Can we say that an attorney neglects to take out his certificate who does not practise;" and the Court ruled that the attorney was entitled to re-admission without the payment of any fine. From this decision, and from all those in which the Court have re-admitted attor-

(a) 3 Dowl. P. C. 56.

(b) 2 Dowl. P. C. 451.

(c) 6 Taunt. 408; 2 Marsh. 123.

(d) 2 D. & R. 238.

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nies without exacting arrears of duty or fine, namely, *Ex parte Clarke* (a), *Ex parte Calland* (b), *Ex parte Cunningham* (c), *Ex parte Richards* (d), *Ex parte Smith* (e), the conclusion may be drawn that an attorney not practising is not within the 31st section; for the only power which the Court has to re-admit an attorney is under the 37 Geo. 3, c. 90, s. 31, which enables them to do so upon payment of the arrears of duty and the penalty; therefore as the Courts have not exacted such payment in the cases above mentioned, and have therefore ruled that the latter part of the section did not apply, they must also have ruled that the disabling clause in the former part does not apply to an attorney out of practice. [*Patteson J.* It follows, from your argument, that all these persons who had been re-admitted on the roll without payment of arrears, are not properly on the roll.] The argument is, that they have never been off the roll; as a certificate is only necessary while they are in actual practice. If a party is struck off the rolls by his own desire, the Court, by their own authority, can order him to be re-admitted, as under the 2 Geo. 2, c. 23, they can order him to be inrolled. *Ex parte Nicholas*, as reported in *Marshall* (f), confirms the view now taken, as the learned judge said there, "The fear is, that as Mr. *Nicholas* has been admitted, and as no certificate was taken out within that year, that admission may be void. I take it, that if a gentleman neglect to take out his certificate within the year his admission is void, whether he practise or not; for the act which requires the certificate to be taken out requires no such qualification;" but he could not have had the statute before him. In *Slack v. Wilkins* (g), where the Court held, that an attorney who had neglected to take out his certificate for the years 1815 and 1816, was liable to the penalties under the 22 Geo. 2, c. 46, s. 12, for practising

(a) 2 B. & Ald. 314.

(b) 2 B. & Ald. 315, n.


(c) 1 Bingh. 91.

(d) 1 Chitt. 101.

(e) 1 Chitt. 692.

(f) 2 Marsh. 123.

(g) 1 C. & M. 23.

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at the quarter sessions in 1832, the attorney had continued to practise during the prior years, although that fact does not appear in the report; and therefore he is quite within the words of the 37 *Geo. 3*, c. 90, s. 37. The Court, however, has ruled, that the words in that section, "the admission, &c. shall be from thenceforth null and void," shall not be construed void to all intents and purposes; for *In Re Ross* and *Hodgson* (a) they held that the omission to take out a certificate did not expose an attorney to the penalties of the 22 *Geo. 2*, c. 46, s. 11; and in *Hodkinson v. Mayer* (b) the Court affirmed that decision. Besides, Mr. *Wilton's* omission to take out his certificate from 1823 to 1826 is remedied by the annual indemnity acts. Even if the Court decide against the plaintiff, this rule asks too much; for it not only seeks to set aside proceedings in Court, but to vacate bills of exchange and other securities, expressly given for the work and labour of the plaintiff. Even if the plaintiff cannot sue for his claim, still where he has received security and payment for work actually done, there is nothing in the 37 *Geo. 3* to compel an attorney, not duly qualified, to give back the security he has received, unless he had obtained it by improper practices.

Addison shewed cause for the assignee of *Wilton*, and relied on *Ex parte Jones* (c); contending that no distinction could be drawn on this point between an admission and a re-admission.

Sir *J. Campbell*, A. G., and Sir *W. W. Follett*, contra. The established practice of Westminster Hall for half a century shews that re-admission is necessary on an omission to take out a certificate for a whole year. At the end of the year, if no certificate has been taken out, the admission, *ipso facto*, becomes void; and the re-admission is matter of indulgence by the Court, on whatever terms may be thought fit.

(a) 4 N. & M. 763; 3 A. & E.
 224.

(b) 1 N. & P. 397.

(c) 2 Dowl. P. C. 451.

The question before the Court is important, because it not only relates to an attorney's right to practise and sue, but it includes all the privileges which belong to the character of an attorney.

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The cases cited upon re-admission establish this rule: not that the Courts will re-admit an attorney when he has not practised, as a matter of course; but that where it appears satisfactorily there has been no practice, either directly or indirectly, that they will re-admit without exacting any arrears. It is now contended, for the first time, that where there has been no practice, re-admission is unnecessary. But who can say what non-practising is? An attorney without clients, in one sense, does not practise; but he could not be called a non-practising attorney. It is quite consistent with Mr. *Wilton's* affidavit, in which he says that he did not practise, that it was only from want of clients. But it is evident want of clients does not amount to not practising. *Ex parte Bartlett* (a) proves this. And there are many cases in which the Court will not dispense with the usual term's notice, although there has been no practising; *Ex parte Watson* (b). The nature of the acts relating to attornies is clearly laid down by Mr. *Tidd* (c). They are partly of a fiscal nature; partly to preserve the respectability of the profession. In *Prior v. Moore* (d) it was held, that the rule of Court made during the Commonwealth, which confined the privileges of an attorney to those who had practised within a year, was no longer applicable; but there has never been any doubt, on the construction of the acts relating to certificates, that all attornies were contemplated, whether practising or not. *Ex parte Nicholas* (e) is a direct authority, that every person must be re-admitted who has omitted to take out his certificate for a whole year. So, in *Skirrow v. Tagg* (f), Lord *Ellenborough* C. J. stated that the 37 *Geo. 3* laid down expressly

(a) 1 Chitt. 207.


(b) 1 Chitt. 208.

(c) 1 Tidd's Pr. 60, 9th edit.

(d) 2 Mau. & Sel. 605.

(e) 2 Marsh. 123; 6 Taunt. 408.

(f) 5 Mau. & Sel. 281.

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the time at which an attorney's admission should become void; and he held, that as the act gave a year's grace, the attorney was not incapacitated till the end of that year. *Slack v. Wilkins* (a) has been attempted to be explained away, on the ground that the attorney there had practised; but that fact formed no ingredient in the judgment of the Court. In *Ex parte Matson* (b), although *Abbott C. J.* held that *neglect* to take out a certificate meant culpable neglect, he did not mean to imply that re-admission was not necessary after an omission, which was not culpable: all that the Court decided was, that when the omission was not culpable, the re-admission might be made without payment of arrears. All the cases cited, in fact, are against the argument urged for the plaintiff, except *Ex parte Jones* (c); and the distinction there drawn by *Parke B.*, that an attorney who has *never* practised after admission does not require to be re-admitted, may perhaps be a true one; but it does not affect the present case. *Hodkinson v. Mayer* (d) has nothing to do with the present case; for all it decided was, that the Court would not apply the provisions of a penal statute to the breach of provisions of a prior statute passed *diverso intuitu*. The decisions, therefore, are all one way; and if the question were *res integra* the Court would arrive at the same conclusion. And it is understood that the Court of Chancery have adopted the same rule. The annual indemnity act has been referred to, to protect the plaintiff; but that only applies to attorneys who have neglected to take out their certificate within the year, not to neglect for a series of years.

Cur. adv. vult.

Lord DENMAN C. J., on a subsequent day in this term, delivered the judgment of the Court:—

This was a motion to set aside a judgment and other securities obtained by the plaintiff from the defendant, for

(a) 1 C. & M. 23.

(b) 2 D. & R. 238.

(c) 2 Dowl. P. C. 451.

(d) 1 N. & P. 397.

business done by him as attorney for the defendant in and subsequent to the year 1826. The ground of the motion is, that the plaintiff was disabled from practising as an attorney by the 31st section of 37 Geo. 3, c. 90.

The plaintiff had been admitted an attorney many years ago, and took out his certificate till the year 1820; he then ceased to do so for three years, and in 1823 he obtained a rule for his re-admission; he did not however take out any certificate until the year 1826, and he swears that in the interval he did not practise.

It is contended on his behalf, that the 26th section of the same act requires an attorney to take his certificate only "during such time as he shall continue so to practise;" that the 31st section applies only where an attorney "shall neglect to obtain his certificate in the manner before directed for the space of one whole year;" that is, shall neglect to take it out "during such time as he shall continue so to practise;" that it is unnecessary for an attorney, who does not continue to practise, to take out any certificate, and that he is at liberty at any interval of time to resume his practice on taking out a fresh certificate, without any application to be re-admitted. The argument is very ingeniously put upon the words of the statute, and if this were a new statute on which we had now for the first time to put a construction, much weight might be given to that argument. But we are of opinion that this statute has received a construction, from the uniform course and practice of the courts in respect to it, from which we ought not to depart. It is true that no express decision is found in the reports, establishing that in all cases where an attorney who has once practised has omitted to take out his certificate for a year, it is necessary that he should be re-admitted, although he may not have practised in that particular year. Yet the instances in which applications for re-admission under such circumstances have been made, and in which the Courts have inquired into the conduct of the attorney in the interim, and have regulated the terms on which he should be re-ad-

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mitted, are without number. We think such a construction of the statute highly beneficial to the public and to the profession, as it enables the Court to inquire into the conduct of its officers, whilst they have, as it were, suspended themselves from their office, and to prevent the re-admission of such persons as may have been engaged in any disreputable pursuit during that time. The statute is said indeed in several cases to be one of fiscal regulation, and no doubt it is so primarily, and for this reason, in the cases cited at the bar the Courts have refused to give it a retrospective effect, so as to subject attornies who have neglected to take out their certificate under this act, to penalties under prior acts of parliament passed altogether *alio intuitu*. With these cases we entirely agree, but the disability now under consideration is created by this very same act, viz. 37 Geo. 3, c. 90, s. 31. We do not put it on the 30th section, which perhaps may not apply. Neither do we at all infringe upon those cases in which, on account of the clients' interests, or those of third parties, the Courts have refused to interfere upon any objection arising under this statute.

The general rule being thus established, the next question is, whether any distinction arises from the circumstance of Mr. *Wilton* having been re-admitted in 1823, and not having practised at all from that time till 1826, when he had his certificate. It was certainly held *In re Jones(a)*, that an attorney need not be re-admitted who had suffered more than a year to elapse between his original admission and the taking out of his certificate, never having practised at all prior to the taking it out; and it is difficult on the first view to see any distinction between an original admission and a re-admission in this respect. The attention of the learned Judge who decided that case, does not appear to have been drawn to *Ex parte Nicholas(b)*; and it is not therefore perhaps so strong an authority as it might otherwise have been; but assuming the decision to be right, we

(a) 2 Dowl. P. C. 451.

(b) 6 Taunt. 406; 2 Marsh. 123.

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think that it does not govern this case. We are of opinion, that an attorney on re-admission is bound to take out his certificate forthwith; the Court deals with his application as made for re-admission to *practise*, and certainly would not grant the rule in any case if it was informed at the time that the attorney did not mean to practise for some time, for it could not then have any control over, or security for, his good conduct in the meantime. In *Coren v. Sharpe*(a) the attorney, who had been re-admitted, had taken out his certificate, and the question was only whether a fresh entry on the roll was necessary. In the case of an original admission, an articled clerk who has complied with the statutes in that respect, and passed his examination, is entitled to be re-admitted on the roll, and the Court cannot impose any conditions.

For these reasons we think that Mr. *Wilton*, in 1826, was incapable of practising, and that his admission was null and void by reason of the statute 37 *Geo. 3*, or, in other words, that he was off the roll of attorneys.

It remains to be considered whether this disability vitiates the securities he has obtained. Now, if he could not sue the defendant for work done as an attorney, he not being lawfully an attorney, as we think he could not, we are of opinion, that in order to give effect to the disabling statute, we are bound to hold that he cannot avail himself of the judgment and securities he has obtained in respect to that work. In this particular case it is sworn that his disability was unknown to his client, and probably that would be so in most similar instances; but we do not rely on that circumstance. We think, that whatever is obtained through the medium of an illegal practice is itself illegal. The rule therefore must be made absolute as to all securities for himself done in his character of an attorney.

Rule absolute.

(a) 1 B. & Ad. 386.



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Thursday,
Nov. 16th.

DOE on the demise of CHARLES ELLIS v. HARDY.

A copy of a provisional assignment entered as a proceeding of the Insolvent Debtors' Court under the 1 Geo. 4, c. 119, ss. 4 and 7, is admissible in evidence under the 7 Geo. 4, c. 57, s. 76; and it is not necessary to shew that the prisoner who made the assignment was adjudged entitled to his discharge.

EJECTMENT for four cottages at Swanage, in the Isle of Purbeck. The demise was laid on the 2nd of November, 1835. At the trial at the Dorchester spring assizes, 1836, before *Littledale J.*, the counsel for the defendant, in answer to the title set up for the plaintiff, tendered in evidence an assignment made by the lessor of the plaintiff to the provisional assignee, on his taking the benefit of the Insolvent Debtors' Act in 1822, and a certificate by the provisional assignee of its being a true copy, was also put in evidence. It was also stated, that the practice at the provisional assignee's office was, that if the petition of an insolvent is dismissed, the word "dismissed" is written across the petition and schedule; but that the petition and schedule of the lessor of the plaintiff remaining in the provisional assignee's office, had no such words written across them. On this assignment being put in under the 7 Geo. 4, c. 57, s. 76, it was contended that the plaintiff must be nonsuited. It was objected for the plaintiff, that the 7 Geo. 4, c. 57, not being in operation at the time of *Ellis's* insolvency, it was not evidence, for that the 1 Geo. 4, c. 119, s. 7, contemplated only copies being given in evidence when an adjudication had taken place, which did not appear to have been the case here. The learned judge gave the defendant leave to move for a nonsuit, and the verdict passed for the lessor of the plaintiff. *Butt* having obtained a rule nisi for a nonsuit in the Trinity term following,

Erle now shewed cause. The certified copy of the provisional assignment by *Ellis* was produced, and was contended to be evidence under the 7 Geo. 4, c. 57, s. 76, but the 1 Geo. 4, c. 119, was the act in operation at the time *Ellis* became insolvent; and although the powers given under the latter act were continued by the 7 Geo. 4, c. 57, s. 1, it

is submitted that a copy of the provisional assignment would not be evidence under the 1 *Geo.* 4, c. 119. Sect. 76 of 7 *Geo.* 4, c. 57, enacts, that certified copies of the petition, schedule, order, or other proceeding made in the matter of an insolvent's petition, shall be evidence. But there is a great distinction in the mode pointed out by the 1 *Geo.* 4, c. 119, s. 7, for proving a provisional assignment. That section enacts, "that when the said court shall adjudge any prisoner to be entitled to his discharge," several consequences shall arise, amongst which, that the assignment made by the insolvent, "whether provisional or otherwise, shall be entered on the proceedings of the court, and an office copy of every such assignment shall be sufficient evidence thereof in all courts;" it is contended, therefore, that the copy of the assignment is only evidence when the prisoner shall have been adjudged to be entitled to his discharge. And therefore as *Ellis* does not appear to have been discharged, the provisional assignment was an imperfect proceeding, and not included in the terms of the 76th section of the 7 *Geo.* 4, c. 57, which authorizes copies to be given in evidence of "proceedings made and had in the matter" of a prisoner's petition. It is true that section 89 of the 7 *Geo.* 4, c. 57, enacts, that all the records, papers and documents belonging to the Court of Insolvent Debtors, shall remain in the custody of the officers there having the custody of them; but that section could not mean that every piece of paper received by the officers of the court under the 1 *Geo.* 4, c. 119, shall be evidence, because it happens to have been preserved by the officer of the court under the 7 *Geo.* 4, c. 57. The intent of the legislature was, that on the proceedings being completed, and on an adjudication that a prisoner is entitled to his discharge, a copy of the provisional assignment should be evidence. [*Patteson* J. The 4th section of the 1 *Geo.* 4, c. 119, enacts, that a prisoner, on making his petition to be discharged, shall make an assignment of all his property, subject to a proviso, that in case he shall not obtain his dis-

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charge, the assignment shall be void; and the 7th section enacts, that such assignment, whether provisional or otherwise, shall be entered on the proceedings of the court. It is given in evidence, therefore, as a proceeding of the court, and the burden lies on you to shew that you can bring yourself within the proviso.] If the original assignment by *Ellis* had been produced, it might not have been open to contend that it was not *prima facie* evidence; but as the defendant has relied upon the statutory proof, he must comply strictly with the requisites of section 7 of 1 Geo. 4, c. 119, namely, he must shew the prisoner obtained his discharge before he can make the copy evidence. *Doe v. Evans (a)*, which was cited at the trial for the defendant, is a distinct case; for there it was proved that the insolvent had been discharged under the act, and therefore the copy of his assignment was receivable under the 7th section. In this case the proceedings under the Insolvent Act appear imperfect and incomplete.

Ball and Fitzherbert, contra, were stopped by the Court.

LORD DENMAN C. J.—It is quite clear that the document produced was a proceeding of the court within the terms of the 76th section of the 7 Geo. 4, c. 57. We are not to assume that something took place to prevent its operation, of which no evidence appears. The title of *Ellis* is relied upon by the plaintiff, and it is for him therefore to make it out; if any thing has taken place to divest *Ellis* of the property, the plaintiff's title of course fails. That which is relied upon for that purpose is the copy of a provisional assignment produced from the Insolvent Debtors' Court made by *Ellis*, the lessor of the plaintiff, under the 1 Geo. 4, c. 119, the proceedings under which act are continued by the 7 Geo. 4, c. 57. It is contended that it does not appear that the proceedings under the former act were complete, and, therefore, that the copy is inadmissible in

(a) 1 C. & M. 450.

evidence. But I do not think that we can make any intendment that the proceedings were not completed under that statute. It was a provisional assignment made under the 4th section, and therefore under section 7 a proceeding of the court, and admissible in evidence.

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PATTESON J.—I am of the same opinion. It is admitted by Mr. *Erle* that the original assignment did in effect carry the property of *Ellis* to the provisional assignee, who was not to be divested till the adjudication. It becomes a mere question, therefore, how that assignment was to be proved. It has been ingeniously argued on the 1 *Geo.* 4, c. 199, s. 7, that such an assignment does not become a proceeding of the court until the whole matter is completed; but I do not think the legislature intended any such effect by their enactment, nor could it have been their meaning. The words of the 7th section evidently point at no such construction. It enacts, “that every such assignment as aforesaid (that is, the assignment mentioned in the 4th section), whether to a provisional or other assignee or assignees, shall be entered on the proceedings of the court, and an office copy of every such assignment shall be sufficient evidence thereof in all courts.” The meaning of which is, that every such assignment, whether provisional or not, shall be part of the proceedings of the court.

WILLIAMS J.—I think there is nothing in the argument that the assignment must be final and conclusive. This record was clearly one of the proceedings under the former act of parliament, which was continued and made proceedings under the 7 *Geo.* 4, c. 57; and I find nothing in either act to require it to be a final proceeding. Being so, it was produced regularly at the trial as a proceeding of the court, and was therefore properly admitted.

COLERIDGE J. concurred.

Rule absolute for a nonsuit.

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*Tuesday,
November 2 1st.*

A schoolmaster retained the plaintiff as a teacher of the French language, on a yearly engagement, at a certain salary, with board and lodging, and dismissed him for absenting himself for two days. In an action for salary, the defendant pleaded that the plaintiff wrongfully absented himself an unreasonable time, to wit, for two days:—Held, after verdict for the defendant, not to be a sufficient reason for dismissal, as it shewed neither moral misconduct nor any injury accruing to the defendant from the absence of the plaintiff.

JACQUES CLAUDE FILLIEUL v. ARMSTRONG, Clerk.

ASSUMPSIT. The declaration stated, that heretofore, to wit, on the 24th February, 1835, in consideration that the plaintiff would enter into the employ of the defendant, as a teacher of the French language and drawing, in a school of the defendant's, for one whole year, at a salary of 60*l.* per annum, together with board and lodging, the defendant promised, &c. Averment, that the plaintiff entered the service and continued up to February 1836, and was willing to continue, &c. Breach, that the defendant wrongfully refused to suffer the plaintiff to continue in his service, &c. 2. Count for work and labour.

Pleas: 1, non assumpsit; 2, as to the first count of the said declaration, the defendant says, that before and at the time when the defendant retained the plaintiff, as in the said first count mentioned, and when the defendant made the promise in that count mentioned; the plaintiff, in consideration of the promises therein mentioned in that behalf, promised the defendant well and diligently and faithfully to serve the defendant in the said capacity of teacher, at the defendant's said school, and not to absent himself therefrom, without just and sufficient cause, except during the times appointed by the plaintiff for vacations at the said school, and the defendant retained the plaintiff as therein mentioned, upon the faith and in consideration of the plaintiff's said promise; and the defendant further saith, that he was always ready and willing to continue to retain and to employ the plaintiff in the capacity aforesaid, for the period and on the terms in the first count mentioned, until the plaintiff misconducted himself as hereinafter mentioned; and the defendant further saith, that after the making of the promise in the first count mentioned, and before the plaintiff was discharged as aforesaid, to wit, on the 23d December, 1836, a certain vacation was appointed by the plaintiff for the said school, to wit, from 24th December, 1835, until

and upon the 29th January, 1836, and it was then appointed by the plaintiff that the said vacation should cease, to wit, on the 29th January, 1836; and that, on a certain day, to wit, the 30th of January, 1836, the said school should recommence, and the plaintiff, as such teacher as aforesaid, should return to the said school and resume his duties as such teacher, of all which the defendant heretofore, to wit, on the said 24th December, 1835, had notice; and the defendant avers that the said plaintiff was absent from the said school during the period appointed for the said vacation, and that it became and was the duty of the plaintiff, as such teacher, to return to the said school and resume his duties as such teacher as aforesaid, when the said vacation ceased, to wit, on the said 30th January, 1836; and although divers of the pupils of the defendant returned to the said school of the defendant on the said 30th January, 1836, and the said school then recommenced, as the plaintiff well knew; yet the plaintiff, not regarding his said promise, nor his duties in that behalf, did not nor would return to the said school, or resume his duties as such teacher, on the day appointed for that purpose, and on the contrary thereof, he the said plaintiff wrongfully absented himself from the said defendant's said service, and neglected to return to the defendant's said school and to resume his duties on the day so appointed as aforesaid, to wit, on the 30th January, 1836, and for a long and unreasonable period, to wit, on that and for the space of divers, to wit, two days, from the day and year last aforesaid, without any just, sufficient or reasonable cause or excuse for such absence, and without the consent and against the will of the defendant, and thereby the defendant was greatly delayed and injured in respect of divers matters and business in which he would otherwise have employed the plaintiff in his said situation and capacity, during the last-mentioned time, and thereby also the defendant was forced and obliged to endeavour to procure another person to serve him in the capacity aforesaid, and in place and stead of the said plaintiff, and thereupon it became and was lawful and necessary and expe-

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dient for the defendant to discharge and dismiss the plaintiff from his said service and employ, as such teacher as aforesaid. Wherefore the defendant afterwards, to wit, at the said time when &c., in the first count mentioned, did refuse to suffer the plaintiff to continue in his said employ, in the capacity aforesaid, and then discharged him therefrom, being the supposed breach of promise in the first count mentioned, as the defendant is ready to verify, &c.

The replication alleged, that after the absence of the plaintiff mentioned in the plea, and before the defendant discharged the plaintiff, the plaintiff returned to the employ of the defendant, and continued in this employ on the terms in the declaration mentioned, until the defendant discharged him as aforesaid. Concluding with a verification, upon which issue was joined.

At the trial, at the sittings after Easter term, 1836, before Lord Denman C. J., the jury first of all found a verdict on the issue of non assumpsit for the defendant, with 15*l.* damages, (it was admitted that this issue should have been found for the plaintiff,) and on the special plea, a verdict for the defendant; but afterwards, after long deliberation, they found a verdict for the defendant generally. *Cresswell* having obtained a rule nisi, in Trinity term, 1836, to enter up judgment for the plaintiff *non obstante veredicto*, on the special plea,

Gurney now shewed cause. The question is, whether the facts stated in the special plea do not afford a valid excuse for dismissing the defendant. He admits that he wrongfully absented himself an unreasonable time, without any just cause or excuse. Such an absence in the usher of a school entirely repudiates the contract he has made to give his services. If he may absent himself from the school for two days, he may for half a year, the absenting himself therefore goes to the essence of the contract. It is true that in *Winstone v. Linn* (a), a plea of justification for dismissing an apprentice, on account of his wrongfully absent-

(a) 2 D. & R. 465; 1 B. & C. 460.

ing himself, was held insufficient; but the decision proceeded entirely on the grounds of the relation between master and apprentice, and the case of master and servant was expressly distinguished. In that case also, *Bayley J.* laid down that the master of the apprentice ought to have shewn on the record, that the offer to return to his service was not made within a reasonable time; on these pleadings the absence for an unreasonable time is expressly averred.

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Cresswell and W. H. Watson. The plea either confesses the contract stated in the declaration, and sets up an insufficient avoidance, or it states a different contract altogether, introducing a new term as to the absence. [*Patteson J.* If it does not confess the contract, you cannot have judgment *non obstante veredicto*, for the cause of action is not admitted.] Then a repleader must be awarded, and the Court will mould the rule accordingly, as was done in *Plummer v. Lee (a)*; but the plea does confess the contract, for although the defendant imports a term as to the plaintiff's absenting himself, it is an implied term in law, in all contracts of this nature. The contract of hiring and service, stated in the declaration, being admitted, it is only gross moral misconduct, or the neglect of some specific duty entrusted to his charge, that could justify the defendant in dismissing the plaintiff; *Callo v. Bruncker (b)*, *Ridgway v. The Hungerford Market Company (c)*, *Atkin v. Acton (d)*. Moral misconduct is not alleged, although it is alleged that the absence was wrongful, and for an unreasonable time; but this does not shew a ground for dissolving the contract; those terms are used with reference to a breach of contract on the part of the plaintiff, and an absence contrary to the contract, for a period, however short, is, in the terms here used, wrongful and unreasonable. Moreover, it is quite consistent with his plea, that no detriment was sustained by the defendant; not a single scholar was deprived of the instruction which the plaintiff

(a) 2 M. & W. 495.

(b) 4 C. & P. 318.

(c) 4 N. & M. 797; 3 A. & E.
 171.

(d) 4 C. & P. 208.

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had contracted to supply. The plaintiff did not fill the ordinary character of a servant to the defendant, but was to supply service of a particular nature. The principle on which a contract can be dissolved by parties to it is, that the act omitted or committed strikes at the root of the contract. Contracts for service depend on the same general rules as other contracts. The instances of justifiable discharge of servants will be found to be for acts which are incompatible with the relation of master and servant. The principle is clearly laid down in *Freeman v. Taylor* (a); in which case a ship was chartered to proceed to the Cape, and having delivered goods there, to proceed, with all convenient speed, to Bombay; the captain, instead of proceeding by the direct course to Bombay, made a deviation to the Mauritius, and Tindal C. J. told the jury that if the deviation was so long and unreasonable, that it defeated the objects for which the contract was made, the contract might be considered at an end.

LORD DENMAN C. J.—We think the contract set up in the declaration is sufficiently confessed, although the defendant has added another term to it, but that certainly is a term implied in law. The question is then, whether the defendant, on such a contract, had a right to dismiss the plaintiff for the causes alleged in his plea. He does not state any injury that accrued to him from the plaintiff's absence, or that he was obliged to engage any other person, or that in consequence of the plaintiff's absence any one of his scholars sustained the least injury. There is, therefore, no breach of duty arising out of the contract, either express or implied, that can justify the defendant in putting an end to it.

PATTESON J.—In the course of the argument it was assumed that the plea contained no confession of the cause of action stated by the plaintiff, and I pointed out that if that were so, there could be no judgment *non obstante*, but I think the plea does confess the contract, for it states in

(a) 8 Bing. 124.

effect that when the defendant retained the plaintiff, as in the declaration mentioned, something passed between them so as to add to the contract. But it is quite clear from the contract, as stated by both parties, that there was no term in it entitling the defendant to put an end to it, or to consider it as void on a given event taking place. There is certainly nothing in the terms to that effect, for the defendant himself goes on to shew in his plea what he considers to be a breach of it. But the breach stated shews neither moral misconduct, nor any injury arising to the defendant from the non-performance by the plaintiff, and would not justify a dissolution of the contract, even between master and servant, much less between parties like the plaintiff and defendant.

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WILLIAMS and COLERIDGE Js. concurred.

Rule absolute, to enter judgment for the plaintiff
non obstante veredicto. (a)

(a) As no damages were found for the plaintiff on the general issue, the rule was afterwards made absolute for a new trial, and at the sittings after term a new trial was had, when the jury found a verdict for the plaintiff on the general issue,

with 4*l.* 4*s.* damages, and a verdict for the defendant on the special plea. A rule nisi was thereupon obtained in Easter term to enter judgment for the plaintiff *non obstante veredicto*, according to the decision in the text.

The QUEEN v. The Justices of the Liberty of RIPON.

WORTLEY, in Easter term last, had obtained a rule calling upon the justices of the liberty of Ripon to shew cause why a writ of *certiorari* should not issue, directed to them, to remove into this Court an order made by them on the appeal of *Thomas Farmery* against a borough rate, in the nature of a county rate of 6*d.* in the pound, made upon the full annual value of all property within the borough of Ripon. The rate in question was made by the town council of the borough of Ripon, under the 5 & 6 *Will.* 4, c. 76, s. 92, and was appealed against at the Ripon quarter ses-

Thursday,
 November 23*d.*

Sect. 132 of the Municipal Act, (5 & 6 *Will.* 4, c. 76,) takes away the *certiorari* to remove an order of quarter sessions, on an appeal against a borough rate.

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sions, 1837, on the ground of its being retrospective; and the sessions, in making an order to quash the rate, stated their grounds for so doing, in order that the opinion of the Court of King's Bench might be taken upon them.

Cresswell and *Baines*, in Trinity term last (a), shewed cause. The order in question is an order of sessions under the 5 & 6 Will. 4, c. 76; and by sect. 192 of that act it is enacted "that no conviction, order, warrant, or other matter made, or purporting to be made, by virtue of this act, shall be quashed for want of form, or be removed by *certiorari*." These words therefore dispose of the application for a *certiorari* (b).

Sir *J. Campbell* A.G. and *Wortley*, contra. The 192nd section, which takes away a *certiorari*, applies only to convictions, orders, &c. made by justices acting singly, and does not include orders of quarter sessions. Then, as sect. 92 authorizes the council of a borough to order a borough rate in the nature of a county rate, and for that purpose gives them all the powers which county justices exercise under the 55 Geo. 3, c. 51, with regard to county rate; and as this Court has decided, in *Rex v. The Recorder of Poole* (c), that the county rate acts apply to rates made under the Municipal Corporation Act, it follows necessarily that the *certiorari* which lies to remove an order of sessions on a county rate, lies equally to remove an order on a borough rate. To take away the *certiorari* in such case, express words of the legislature are required, and the leaning of the Courts has always been, not to extend any provision of the legislature on the subject: *Rex v. Eaton* (d), *Rex v. Terret* (e). In the latter case the *certiorari* was

(a) June 8th, before Lord Denman C.J., Littledale, Patteson, and Williams, Js.

(b) Cause was also shewn as to the order itself, but the decision


of the Court makes it unnecessary to give the arguments.

(c) 1 N. & P. 756.

(d) 2 T. R. 89.

(e) 2 T. R. 735.

taken away with regard to proceedings on a particular offence by one statute, and a subsequent statute was passed, giving further powers to the sessions as to the punishment; and it was held that the clause relating to the *certiorari* could not be extended to proceedings under the latter statute. *Rex v. Rogers* (a) is to the same effect. It is submitted also that the present order of sessions is not only not within the words of sect. 132, but that it is not an order under the Municipal Corporations Act at all. It is an appeal under the County Rate Act, 55 Geo. 3, c. 51, the provisions of which are extended to the borough rate by sect. 92 of the Municipal Act.

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Cur. adv. vult.

Lord DENMAN C. J. on this day delivered the judgment of the Court.—This was a motion for a writ of *certiorari* to remove an order of sessions, quashing on appeal a rate in the nature of a county rate, made by the town council of the borough of Ripon under the 92nd sect. of 5 & 6 Will. 4, c. 76. We are of opinion that the 132nd sect. of the same act takes away the writ of *certiorari*. It is general in its terms, and enacts “that no conviction, order, warrant, or other matter made, or purporting to be made, by virtue of this act, shall be removed by *certiorari*.” Now it is clear that this order of sessions is made by virtue of the act; and though, by the 92nd section, the borough rate is to be made in the same manner as a county rate, or as near thereto as the nature of the case will admit, and a county rate may be removed, yet that consideration does not do away with the effect of the 132nd section.

Rule absolute.

(a) 5 B. & Ald. 773. See also *Rex v. Trustees of the Norwich and Watton Roads*, 1 N. & P. 32.



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The QUEEN v. PARRY.

1. Where the revision of burgess lists for a borough divided into wards, has been made by the mayor and assessors for the whole borough, elected under sect. 32 of 5 & 6 Will. 4, c. 76, instead of the assessors for the mayor's ward, under sect. 43, it is ground for the Court granting a quo warranto information against any councillor elected by burgesses so revised.

2. If a quo warranto information will probably dissolve a corporation, the Court will exercise a discretion as to granting it.

3. Where the revision of the burgess lists took place before assessors elected for the whole borough, instead of the assessors for the Mayor's Ward, and it appeared that this course was adopted bonâ fide in pursuance of legal advice, and no improper motive or injurious consequences were pointed out, the Court refused to grant a quo warranto information, which would probably have had the effect of dissolving the information.

4. A party who has been a candidate, and voted at an election, is not a good relator of a quo warranto information, which seeks to impeach the validity of that election; but his affidavits may be used by a rated inhabitant, to whom the same objection does not apply, even although the affidavits of the latter would not be sufficient without the former.

5. A burgess of a corporation is a good relator of a quo warranto information, although the effect of the information would be to dissolve the corporation.

SIR W. W. FOLLETT, in Michaelmas term last, had obtained a rule, calling upon the defendant to shew cause why an information in the nature of a quo warranto should not be exhibited against him, for acting as a town councillor of the borough of Hereford, on the grounds, 1st, that he was not duly elected by a majority of the burgesses duly inrolled; 2d, that there was no regular burgess roll in existence at the time of his supposed election.

This rule was obtained on the affidavits of *William Henry Cooke*, attorney at law, *John Roberts*, and *William Pulling*. It appeared by them that Hereford was a borough, divided into three wards, named Ledbury Ward, Monmouth Ward, and Leominster Ward, and that two assessors were duly elected for each of those wards, pursuant to sect. 43 of 5 & 6 Will. 4, c. 76, and that two separate assessors had also been chosen for the whole borough, under sect. 43, and that the revision of the burgess lists, in October, 1836, was made by the mayor and the assessors for the whole borough, and not by the assessors for the mayor's ward.

By the affidavit of Mr. *Cooke*, it appeared that he attended professionally before the mayor, at the revision, as the agent for certain burgesses, and objected to the revision, and required the mayor to be attended in his revision by the ward assessors.

John Roberts described himself in his affidavit to be an inhabitant householder and rate-payer, in Monmouth Ward,

in the borough of Hereford, and that by some means or other, *A. B., C. D.*, and several other burgesses, who, the deponent believed, would have voted for him as a councillor for Monmouth Ward, were altogether omitted from the burgess roll of the said ward, and otherwise incorrectly and unduly revised; and that one *John Parry*, not being a burgess duly inrolled, was afterwards elected a burgess for Monmouth Ward, the persons who voted for him not having been duly inrolled.

Mr. Pulling described himself in his affidavit to be a resident and inhabitant householder in Ledbury Ward, in the borough of Hereford, and stated, that though his name was inrolled as a burgess for Ledbury Ward, he did not vote at the last election.

In the affidavits in answer, it stated that the proceedings at the revision were held before the two assessors chosen for the borough, in consequence of eminent legal advice which the town clerk had obtained, and that at the revision of the lists for Monmouth Ward, (for which *Mr. Parry* was afterwards elected councillor, and *Mr. Roberts* was a candidate,) there were no claims for names to be inserted, or any objection made to the overseers' lists, and that there were only two or three claims in the other wards.

Sir J. Campbell A. G., Maule and Chilton, in Hilary term last, shewed cause (*a*). There are several grounds for discharging this rule; 1st, that if made absolute, the corporation would be dissolved; 2d, that there is no proper relator; 3d, that the revision was not invalid in toto.

I. If the point taken be good law, that the revision of burgess lists *must* be before the assessors of the mayor's ward, the objection applies to the whole corporation. There can be no good councillors, nor burgesses, and accordingly the whole corporation must be dissolved. But this Court will not grant a rule to dissolve a corporation,

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First point:
 The Court
 will not grant
 a rule which
 will dissolve a
 corporation.

(*a*) Friday, Jan. 27, before Lord Denman C. J., *Williams* and *Cole-ridge* Js.

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where the application is made by parties merely through political hostility. In *Rex v. Trevenen* (a), Abbott C. J. said, "Where a corporation acts contrary to the franchises which have been granted to it, and invades the rights of the crown, the Attorney-General, of his own authority, and without any application to this Court for leave, may exhibit an information against them. But in the case of individual members of the corporation, the case is different; for then it is wholly within the discretion of the Court to say, whether such an information ought to be granted or refused." The Court therefore looks to the motives of parties making these applications. It is impossible not to see that here the motives are rancour in political opponents, and therefore the Court, upon such grounds, will not grant a rule that will put an end to all municipal government in the borough. The objection made, besides, is most frivolous, for it is sworn that in Monmouth Ward, for which the defendant was elected, there was not a single claim or objection, and at the election of the borough assessors there was no opposition at all.

Second point:
 No good relator.

II. There is no good relator in this case, for Mr. Cooke is not even an inhabitant of the borough, and *Roberts* and *Pulling* are both burgesses, the former of whom voted at the election, and was a candidate for Monmouth Ward. If the burgess list is not a good one, what right had they to vote or to be on the burgess list? They might themselves be subject to a quo warranto information. They therefore stand in the same situation as the defendant, and upon their relation the Court will not grant the quo warranto information. *Rex v. Bond* (b), *Rex v. Trevenen* (a), *Rex v. Parkyn* (c). *Rex v. Bracken* (d) is quite in point, for the Court held there a freeman could not be the relator of a quo warranto information against his own corporation.

Third point:
 The revision of burgess lists by the borough assessors, not ground for a quo warranto information.

III. By sect. 18, two assessors to be chosen, as directed in sect. 37, are to revise the burgess lists with the mayor;

(a) 2 B. & Ald. 339, 479.

(b) 2 T. R. 767.

(c) 1 B. & Ad. 690.

(d) 1 Alc. & Nap. 113, (Irish).

no reference is made in those sections to the borough being divided into wards or not, and by them the revision has been made in this borough. The Court therefore is not called upon to put any construction on sect. 43, which speaks of the assessors for the mayor's ward. Even if the assessors who acted were not the right assessors, their offices are merely ministerial; it is the mayor who is directed to insert in the lists the names of every person proved to be entitled; and it appears that there was nothing for the assessors to do, as there were neither claims nor objections in Monmouth Ward, and only two or three claims in the other wards.

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Sir W. W. Follett and *Whately*, *contrâ*. If neither *Pulling* nor *Roberts* are good relators, there never can be a good relator, upon an objection like the present. Who is to make the objection if inhabitants are precluded? It is alleged that *Roberts* voted at the election, but *Pulling* did not, therefore he applies to the Court as a rated inhabitant of the borough, who has in no ways concurred in any illegality. The objection made in the case cited from the King's Bench in Ireland, to a freeman being a good relator, does not at all apply to the case of a rated inhabitant.

If *Pulling* is a good relator, it is immaterial whether the others are good or not; *Rex v. Trevenen* (a). As to the application being founded on political motives, the same observation was made in the *Bodmyn* cases (b), but without effect, and it is obvious that all such applications are so made. In *Rex v. Parkyn* (c), the objection was, that the relator himself had voted, but that is not the case with Mr. *Pulling*.

II. The argument as to the dissolution of the corpora- First point.
tion will not prevail with the Court. It was strongly made in *Rex v. White* (d). The objection there to the

(a) 2 B. & Ald. 479.

(c) *Rex v. Parkyn*, 1 B. & Ad.

(b) *Rex v. Benney*, 1 B. & Ad. 690.

684; *Rex v. Parkyn*, 1 B. & Ad.
690.

(d) 1 N. & P. 84.

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mayor's title, if valid, would have dissolved the corporation, but that consequence did not deter the Court from making the rule absolute. The rule is, that if a case is sufficiently made out to the Court, a quo warranto information will be granted, whatever may be the effects of it.

Third point.

III. On the main point, the borough of Hereford has put a different construction on the Municipal Corporation Act to any other borough in the kingdom. It is true that sects. 18 and 37, direct the election of two assessors, by whom the burgess lists are to be revised, but those sections only apply to boroughs without wards. Where the borough is divided into wards, it is quite clear that sect. 43 applies, and that the revision is to be made by the assessors for the mayor's ward. Even if it be a doubtful question of law, a quo warranto information ought to go.

Cur. adv. vult.

Lord DENMAN C. J., in last Easter term, delivered the judgment of the Court.—This was an application for a quo warranto against the defendant, to shew by what authority he claimed to hold the office of a town councillor in the city of Hereford. The ground of objection to his title was, that the burgess roll for the Monmouth Ward in that city had not been revised, pursuant to the provisions of the 5 & 6 Will. 4, c. 76. This objection was stated in two ways, 1st, that the defendant had not been elected by a majority of burgesses duly inrolled; 2d, *that no burgess roll existed at the time of his election*. It appeared that although Hereford had been divided into wards, and two assessors duly elected for each ward, yet instead of the burgess list for the whole city having been revised by the two assessors of the *Mayor's Ward*, pursuant to the 43d section of the act, two separate assessors had been elected for the whole city, under the 37th section, and the revision had been made by the mayor with them. If these two had no authority to form part of the court of revision, the court itself was never competently formed. The mayor was sitting

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alone, when by the statute he and two assessors are required to form the Court. This objection is of so serious a nature, and received at the bar so insufficient an answer, that the rule undoubtedly ought to be made absolute, unless some one of the preliminary or personal objections which were made to it, be sustainable. On these the arguments mainly turned, and we took time to consider them. The affidavits in support of the rule were made by three persons, of the name of *Cooke*, *Roberts*, and *Pulling*. It was objected to *Roberts*, that he, with a full knowledge of the objection to the burgess list now insisted on, had taken a part in the election in question, by being himself a candidate, and voter therein; and to *Cooke*, that he had also taken an active part as an agent in the election, and besides, had no such interest as qualified him to be a relator, being neither burgess nor inhabitant, but only a visitor there, on certain occasions. It was not much insisted on that the information could be filed at the relation of either of these persons. But *Pulling* was put forward as a relator, against whom no objection existed, for he was an inhabitant of the city, subject to its municipal government, and therefore interested in the due election of the council; *Rex v. Hodge (a)*; and although by his agent, *Cooke*, he had protested at the revision court against the legality of the revision, he had taken no part nor been present at the election for councillors. In the case of *Rex v. Symonds (b)*, in which four persons made affidavits in support of a rule for a quo warranto, there were valid personal objections against three as relators; none existed against the fourth; but it was urged that as all were acting in concert, no distinction could be made. The Court, however, made the rule absolute; the counsel avowing such fourth person to be the relator, and that he would be responsible for the costs. It was there indeed stated that the relator's affidavit "disclosed the whole ground on which the defendant's title

(a) 2 B. & A. 344, n.

(b) 4 T. R. 223.

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was impeached;" and this case certainly could not stand on the affidavit of *Pulling* alone. We do not think that a material circumstance; nor is it relied upon by the Court in the decision cited. A relator's case will constantly depend in part on the testimony of those who, from want of interest or their previous conduct, could not be themselves relators. In such cases the Court will ascertain who is the real relator, and that he is sufficient. It will then distinguish between him and those who are merely his witnesses; and will not affect him by their previous acts or declarations unless he be identified with them in such as disqualify from being received as a relator. It was, however, urged, in shewing cause, that if *Parry* be not duly elected, it is only because there is no good burgess list in existence;—an objection which not only applies to all the councillors elected at the same time, but to all the existing burgesses; and shews that no future valid election can be made to any municipal office in the city. The force of this objection remains to be considered. It cannot be stated as a proposition of law, or as a settled rule of practice in this Court, that leave to file an information will not be granted, *merely* because the effect may or even will be to dissolve the corporation. That objection was recently made in the case of *Rex v. White (a)*, and under the circumstances properly overruled. The facts of that case indeed hardly substantiated the objection; but our brother *Patteson* there stated, that "where the objection is in itself an individual objection, the circumstance of every member of the corporation being in a similar predicament to the person against whom the motion is made, is not a sufficient ground to refuse a quo warranto." And we all agree, that *in itself and standing alone*, it is not. But the argument at the bar in support of the present rule did not and could not stop short of denying all discretion in this Court as to originating proceedings in quo warranto. It was in effect asserted, that wherever a reasonable doubt is raised as to the legal va-

lidity of a corporate title, we are bound to grant leave to file the information. This proposition, however, is wholly untenable. Every case (and they are most numerous), which has turned upon the interest, motives or conduct of the relator, proceeds upon the principle of the Court's discretion. However clear in point of law the objection may have been to the party's abstract right to retain his office, yet the Court has again and again refused to look at it, or interfere upon one or other of these grounds. In the case of *Rex v. Trevenen* (a), Abbott C. J. lays down the general rule in accordance with this view, and also incidentally directs its application to a case like the present. "In the case of individual members of a corporation, it is wholly within the discretion of this Court to say whether an information ought to be granted or refused; the Court have undoubtedly in some instances permitted these informations to be filed, where the effect has been thereby to dissolve the corporation, *but that has been where strong cases have been made out.*" Cases much earlier and nearer to the date of the statute of *Anne* may be found, which not merely lay down the rule, but shew that it had grown into the admitted practice of the Court. The cases of *Rex v. Dawes* and *Rex v. Marten*, or the *Winchelsea Cases*, as they were called, are very remarkable in this point of view. They were often before the Court and well considered, and may be found in 1 *W. Bl.* 634, and 4 *Burr.* 1962, 2022, and 2120. In them Lord *Mansfield* treats the discretionary power of the Court not as a matter disputed, or requiring proof, but as a settled principle to be applied. And in 4 *Burr.* 2123 he states the grounds on which the Court in those cases proceeded in their application of the principle. "1st. The light in which the three relators now informing the Court of this defect of title, appear, from their *behaviour and conduct* relative to the subject-matter of their information, previous to their making this motion. 2nd. The light in which the application itself

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(a) 2 B. & A. 482.

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manifestly shews their *motives*, and the purpose which it is calculated to serve. 3rd. The *consequences* of granting the information." After examining the affidavits with these points in view, the rules were both discharged, though it appeared clear that the titles of both the defendants, at the times of their election, were invalid.

These seem to be grounds safely applicable to the present case. On the one hand, if the rule be made absolute, the dissolution of the corporation may at least be reasonably apprehended: on the other, it is remarkable that the affidavits in support of the rule impute no corrupt, fraudulent or indirect motive for the acts complained of as irregular; nor do they allege that they have produced injustice, inconvenience, or even any one result different from what would have followed the fullest compliance with the law, as they lay it down. They do not go the length of suspecting that a single vote has been won or lost, or that the burgess list would have varied in a single name. It appears, moreover, that the town-clerk had taken the precaution of procuring, and had *bonâ fide* acted upon the most eminent legal advice: and in fact, neither claim nor objection, as regarded the Monmouth Ward, was made to the overseers' list. We do not say that the court of revision had therefore no duties to perform; but in fact they were not called upon to perform any; and the defective constitution of the court has been in all respects an immaterial circumstance. If these considerations would, under the old law, have been entitled to weight, they lose none from the passing of the recent statute. On the contrary, the difficulties that might attend the reconstruction of corporations once dissolved, and the important functions now vested in the municipal bodies, would rather induce increased circumspection in our proceedings. The inferior officers ought indeed to conform with care to the provisions of the law: the wilful departure from them this Court will visit with severity, and even negligence may not always escape animadversion. But our discretion to the issue of quo

warranto informations must be regulated by a regard to all the circumstances which attend the application, and all the consequences likely to follow. Upon the whole, for the reasons stated, we act most in accordance with the current of authorities, with the statute of *Anne*, and with the public interest, in refusing the permission prayed by the present rule. As there was great irregularity, however, in the appointment of the court of revision, we think that it ought to be discharged without costs.

Rule discharged.

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RAWSON v. EICKE.

Monday,
November 6th.

ASSUMPSIT. The first was for the use and occupation of a certain messuage, and the second on an account agreement for a lease, and not a lease. An agreement made &c., between &c., *H.* agrees to make and execute to *E.* a good and valid lease of all that messuage, &c. to hold to the said *E.*, his executors and assigns, for the term of seven years from the 24th day of June next, at and under the yearly rent of 105*l.* clear of all taxes and assessments (except the land-tax), payable half-yearly, the first half-yearly payment to be made on the 25th day of December next. And it is hereby agreed, that the said lease shall contain a covenant on the part of the said *E.* to pay the said rent, also to keep the said premises in repair (damages by fire excepted); also a proviso for re-entry on non-payment of the said rent by the space of twenty-one days after the same shall become due, or on non-performance of any of the covenants on the lessee's part to be performed. And the said *E.* agrees to accept of such lease as aforesaid upon the terms and conditions above specified, and to execute a counterpart thereof. And the said *E.* further agrees (when and so soon as the messuages or dwelling-houses on either side of the said messuage hereby agreed to be demised shall become tenanted and occupied), to pay to the said *H.* an additional yearly rent of 15*l.* during the remainder which shall be thenceforth then to come of the said term of seven years. And the said *H.* agrees, on or before the 24th day of June next, to erect eight light panels in front of the drawing-room windows, and fence blinds to same windows, to paper the hall and staircase, and all the rooms, save those on the basement and attics; also to place, set and fix a range in the kitchen, with boiler and oven, and stoves in all the rooms having fire-places; also to fix and hang the bells and knocker on the front entrance door; to complete the pantry windows, and lay on the water, and to paint, in imitation of marble, the chimney-pieces in the dining and drawing-rooms. And it is hereby agreed, that by the said lease hereby agreed to be granted, the rent therein reserved shall be 120*l.*, and that by a separate deed to bear date the day next after the said indenture of lease, the said *H.* shall release to the said *E.*, out of the said annual rent of 120*l.*, the annual sum of 15*l.* Witness our hands. The said *E.* to prepare lease at his own cost, to be approved of by lessor's solicitor.

On the execution of the above agreement *H.* made an assignment of the premises for 99 years by way of mortgage, and then became bankrupt:—It was held, that the mortgagee could maintain an action for use and occupation in respect of an occupation after the execution of the mortgage to him, and notice of that mortgage to the defendant.

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stated. The particulars of demand stated, that the action was brought to recover the sum of 52*l.* 10*s.* for half a year's rent of a house at St. Leonard's, due 25th December, 1836.

At the trial before *Littledale J.* at the Lewes summer assizes, 1837, it appeared that the house in question had belonged to a builder of the name of *Homan*; that on the 28th April, 1835, *Homan* entered, with the defendant, into an agreement or lease for seven or fourteen years at 105*l.* rent, of which the following is a copy:—

“An agreement made the 28th day of April, 1835, between *Benjamin Homan*, of St. Leonard's-on-Sea, in the county of Sussex, builder, of the one part, and *Charles Eicke*, of the same place, gentleman, of the other part.

“The said *Benjamin Homan* agrees to make and execute unto the said *Charles Eicke* a good and valid lease of all that messuage or tenement and dwelling-house situate on the Marina, St. Leonard's aforesaid, and numbered 67, together with all cellars, watercourses, easements, and appurtenances thereunto belonging: To hold to the said *Charles Eicke*, his executors and assignus, for the term of seven years from the 24th day of June next, at and under the yearly rent of 105*l.* clear of all taxes and assessments (except the land-tax), payable half-yearly, the first half-yearly payment to be made on the 25th day of December next. And it is hereby agreed, that the said lease shall contain a covenant on the part of the said *Charles Eicke* to pay the said rent; also to keep the said premises in repair (damages by fire excepted); also a proviso for re-entry on non-payment of the said rent by the space of twenty-one days after the same shall become due, or on non-performance of any of the covenants on the lessee's part to be performed. And the said *Charles Eicke* agrees to accept of such lease as aforesaid upon the terms and conditions above specified, and to execute a counterpart thereof. And the said *Charles Eicke* further agrees (when and so soon as the messuages or dwelling-houses on either side of the said messuage hereby agreed to be demised, shall become tenanted and

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occupied), to pay to the said *Benjamin Homan* an additional yearly rent of 15*l.* during the remainder which shall be thenceforth then to come of the said term of seven years. And the said *Benjamin Homan* agrees, on or before the 24th day of June next, to erect eight light panels in front of the drawing-room windows, and fence blinds to same windows, to paper the hall and staircase, and all the rooms, save those on the basement and attics; also to place, set, and fix a range in the kitchen, with boiler and oven, and stoves in all the rooms having fire places; also to fix and hang the bells and knocker on the front entrance door; to complete the pantry windows, and lay on the water, and to paint, in imitation of marble, the chimney-pieces in the dining and drawing-rooms. And it is hereby agreed, that by the said lease hereby agreed to be granted, the rent reserved shall be 120*l.*; and that by a separate deed to bear date the day next after the said indenture of lease, the said *Benjamin Homan* shall release to the said *Charles Eicke*, out of the said annual rent of 120*l.*, the annual sum of 15*l.* Witness our hands. The said *Charles Eicke* to prepare lease at his own cost, to be approved of by the lessor's solicitor.

"N.B.—It is agreed that Mr. *Homan* may have the option of making the lease fourteen years."

The above document was stamped as an agreement, and not as a lease. It was admitted that the defendant had occupied, and was in the occupation of the house. On the 25th of July, 1835, *Homan* assigned the message in question to *Rawson*, the plaintiff, for a term of 99 years, by way of mortgage. In 1836 *Homan* became bankrupt. On 27th September, 1836, *Rawson*, the plaintiff, gave the defendant notice to pay the rent to him. The defendant had refused to pay the plaintiff, assigning as a reason that he had not got his lease. The plaintiff had told him that he would grant to him a lease. It was objected on the part of the defendant, that the above written instrument ought not to be received in evidence, as it was a lease, and not an agreement,

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and that if it was considered as an agreement, and not a lease, the only person who could sue upon it was *Homan*, and that the mortgage in July, 1836, from *Homan* to *Rawson*, the plaintiff, could not transfer the right to sue on the agreement, as that would be transferring a chose in action. The learned judge directed a verdict to be taken for the half-year's rent, which was accordingly done, and gave the defendant leave to move to enter a nonsuit.

Platt on this day moved for a rule nisi for a nonsuit, upon the same grounds which he urged at the trial.

The COURT said they would confer with *Littledale*, J.

Lord DENMAN C. J. on the following day delivered the judgment of the Court:—The stamp was correct, as the instrument was an agreement for a lease. The other objection cannot prevail, because the first landlord had parted with his property, and the new proprietor had a right to sue the actual occupier of the property for use and occupation. The rule must therefore be refused.

Rule refused.

Wednesday,
November 8th.

BRICKILL v. Sir CHARLES HULSE, Bart.

In an action of trover, against the sheriff for taking the goods of the plaintiff, an affidavit made by the officer under the Interpleader Act, respecting the said goods, is admissible in evidence to prove that the officer who seized the goods is the servant of the sheriff.

TROVER for chattels. Plea, payment of 20*l.* into Court, and that the plaintiff had not sustained damages to a greater amount.

At the trial before *Tindal* C. J. at the Hampshire summer assizes in 1837, it appeared that the defendant was sheriff of Hampshire in the year 1836, and in that year a writ had issued to the sheriff to levy 22*l.* 14*s.* 6*d.* of the goods of one *Wyatt*, an innkeeper, and a warrant was issued to a sheriff's officer of the name of *White*. Other writs came to the sheriff, but before an execution on the last writs was put in, a bill of sale, given by *Wyatt* to one *Wade*, was given to *White*, the sheriff's officer, to be executed. Whilst

White was in possession, a number of articles were taken away from the house with the concurrence of *White*. *Wade* paid off the amount of the different executions, and *White* sold the goods for him. *Brickill* had a bill of sale of the goods, dated in 1834, of which *White* had notice. *Brickill* brought an action against *Wade*, and in that action the validity of *Brickill's* bill of sale was affirmed; and it had been agreed between the plaintiff and defendant, that they should be bound by the event of that suit as to the validity of the bill of sale. The defendant had applied to have the benefit of the Interpleader Act, and, to obtain the interpleader rule, had used an affidavit made by *White*, in which he stated that he was the officer of the sheriff, and that he had seized and sold the goods. That was the only evidence the plaintiff had of the seizure by the defendant. Two objections were made by the counsel for the defendants; first, that the abstraction of the goods was occasioned by the negligence of *White*, and for that injury the plaintiff should have brought an action on the case for negligence, and not an action of trover; secondly, that the affidavit made by *White* was not receivable in evidence, as *White* was then in Court, and might have been called. The learned chief justice of the Common Pleas overruled both objections, and received the affidavit in evidence, and a verdict passed for the plaintiff. Leave was given to the defendant to move to enter a nonsuit.

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Erle (and *Bere* was with him) now moved for a rule nisi for a new trial, or for a nonsuit. The plaintiff should have brought an action on the case for negligence, and not an action of trover. There was no evidence of any conversion by the officer. [The Court intimated that they would speak to the chief justice of the Common Pleas on this point.] The affidavit ought not to have been admitted in evidence, it resembled a deposition in Chancery, which would clearly have been inadmissible. It is laid down in *Phillips on Evidence*(a),

(a) Vol. i. p. 346, 6th ed.

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"that depositions are not to be admitted in evidence for a party to the suit against one who is not a party, nor claims under either of the parties; nor can they be used by a stranger against one of the parties." For the latter proposition *Rushworth v. The Countess of Pembroke and Currier* (a) is cited. It is a general principle that depositions cannot be used when the witness is alive. This action is wholly distinct from the application which is made by the sheriff under the Interpleader Act.

Lord DENMAN C. J.—It is very important that there should be no doubt on these matters, which are occurring every day. This affidavit was clearly receivable in evidence. What a man produces as a true statement, is evidence against him. I do not see what there is to distinguish this from the ordinary case of a written statement produced by a party. At first sight the case of *Rushworth v. The Countess of Pembroke and Currier* (a) seems opposed to this view. In that case the Countess wished to make use of depositions which had been made in a former suit against *Currier*, and to which suit she was not a party. That was not permitted. The answer to that case is, the depositions in Chancery are very different proceedings from the affidavit in this case. The party who applies to a person to be a deponent has not the opportunity of examining. He is examined before the examiner, and then states what he thinks proper. The deposition is sealed up until it is made use of in Court. It is, however, a very different case to where a party uses an affidavit, of the contents of which he is fully aware. The principle, therefore, that the deposition of a witness, who is alive, cannot be used, is not interfered with by our decision.

PATTERSON J.—I am entirely of the same opinion. It is to be assumed that the application under the Interpleader

(a) Hardres, 472.

Act was made by the sheriff. If, however, it was made by the officer, this action is, in fact, against the officer; they are identical in interest. The sheriff then produces before a judge a statement which relates to the matter in dispute. Surely that document may be read in evidence against him. It is the production of a statement before a judge by a party for his own purpose, and is therefore evidence against him.

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WILLIAMS J.—There is no difficulty. This affidavit is the same as if the sheriff had made a statement not upon oath. He made the statement to further the object he had in view. It is a statement by the sheriff, and its being on oath cannot vitiate it.

COLERIDGE J.—There is no difficulty in principle on which this case depends. The only circumstance which raises a doubt is the case of *Rushworth v. The Countess of Pembroke and Currier*(a). What are the facts of this case? The sheriff's officer makes a statement, the sheriff sees it, adopts it, and makes it his own. No one can doubt it was evidence against the sheriff. It may be open to the remark, that the party who uses the affidavit is afraid to call the witness. What is the case of a deposition in Chancery? It is not taken like the examination of a witness in a Court of Law. Can it be said, if a person calls a witness in one suit, that his examination is evidence against him in another suit? It can never be said, that because a party uses a deposition so made, he is to be bound by the admissions in the deposition on all future occasions. One therefore is the case of a witness sworn to give testimony, the other is a statement adopted by a party for his own purposes.

Lord DENMAN C. J. on a subsequent day (November

(a) *Hardres*, 472.

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22nd) said—We do not think there was any misdirection. There was evidence of the sheriff's officer concurring with the debtor.

Rule refused.

Saturday,
November 4th.

In an action by an indorsee against the indorser of a bill of exchange, the pleas denied the indorsement, the presentment, and the due notice of dishonor, and alleged the want of consideration. At the trial, the bill appeared to have been altered from the 15th to the 10th December:—It was held, that it was not incumbent upon the plaintiff to explain the alteration, because the making of the bill was admitted upon the record.

SIBLEY v. FISHER.

THIS was an action of assumpsit, by an indorsee, against the indorser of a bill of exchange. The first count of the declaration stated, that the bill of exchange was dated the 10th December, 1836, and was drawn by *John Smith* on *John Smith* the younger, for 26*l.* 10*s.*, payable three months after date; that it was indorsed by *John Smith* the younger, to the defendant, who indorsed it to *Joshua King*, who indorsed it to *William Dakin*, who indorsed it to *Edward Handley*, who indorsed it to the plaintiff. The four first pleas severally *denied the indorsements* stated in the declaration. The fifth plea denied that the bill had been presented to the drawer. The sixth plea alleged that the defendant had not due notice of the non-payment of the bill. The seventh plea alleged, that there was not any consideration or value for the indorsements on the bill, and that the plaintiff held the bill without any consideration. The replication took issue on the pleas.

At the trial before Lord *Denman* C. J., at the sittings after Trinity term, 1837, for Middlesex, the bill was produced, and was dated the 10th December, but it appeared to have been altered from the 15th to the 10th December. It was contended, on the part of the defendant, that the bill having been altered after it had been accepted, required a new stamp, and that although the pleadings admitted the existence of a bill of exchange, yet that the Court ought not to look at the bill until the alteration had been explained, and that it was incumbent on the plaintiff to explain the alteration. The Lord Chief Justice overruled the objection, and a verdict passed for the plaintiff for 27*l.* 7*s.*

Jervis (and *F. V. Lee* was with him) now moved for a rule nisi for a new trial, on the objection taken at the trial. There is no doubt that where a bill has been altered, it is incumbent on the party who sues upon the bill to explain the alteration. It was said at the trial, in answer to this objection, that the defendant had not, by his pleas, denied the making of the bill of exchange; but the Court cannot look at the bill, or the indorsements, without having the alteration in the bill explained. It is laid down in *Henman v. Dickinson* (a), that where a party sues on a bill of exchange, which on the face of it appears to have been altered, it is for him to shew that the alteration has not been improperly made. Here, the plaintiff could not prove the indorsements without the production of the bill, it was therefore incumbent on him to explain the alteration.

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Cur. adv. vult.

LORD DENMAN C. J., on a subsequent day, (Nov. 15,) said, we think that upon these pleadings the plaintiff was not bound to account for the alterations in the bill. The only issues raised by this record are, as to the indorsements, the presentment, the notice of dishonor, and of the consideration. The making of the bill was therefore admitted on the record, and it was not incumbent on the party producing the bill to give any explanation of the alteration. The rule must therefore be refused.

Rule refused.

(a) 5 Bing. 183.



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*Saturday,
Nov. 18th.*

SMITH v. HAYWARD.

1. When a servant was retained for a year, his wages to be paid quarterly, he was dismissed at the end of a month from the commencement of the second quarter; he then, before the expiration of the quarter, brought an action of indebitatus assumpsit for work and labour; money was paid into Court sufficient to satisfy for the work done:—It was held, that the defendant was entitled to a verdict, as at all events the plaintiff could not maintain an action until the end of the quarter.

2. *Seemle*, an action of indebitatus assumpsit, for work and labour done, cannot be maintained by a servant, although he may have been ready and willing to perform the labour, and may have been improperly dismissed from the service.

ASSUMPSIT. The first count stated, that in consideration that the plaintiff, on the 1st day of June, 1835, had promised and agreed to serve the defendant as a compounder of drugs, for one whole year from that time, and so from year to year as long as the parties should respectively please, at a salary of fifty guineas a year, payable quarterly; the defendant undertook and promised so to employ him, and alleged as a breach, the dismissal of the plaintiff on the 19th of September following. The second count was for work and labour done and performed.

The defendant pleaded to the first count non assumpsit, and that he did not dismiss the plaintiff, as in that count mentioned; and on the second count he paid 4*l.* into Court, and pleaded non assumpsit ultra that sum.

At the trial before *Gaselee J.*, at the Bucks Lent assizes, in 1836, it appeared that on the 1st of June, 1835, the defendant, who was a surgeon at Aylesbury, engaged the plaintiff as a compounder of drugs; the salary which the plaintiff was to receive was not mentioned in the letter of the defendant, which formed the basis of this contract, but on the 31st of August following, the defendant paid to the plaintiff 13*l.* 2*s.* 6*d.*, as a quarter's salary, being at the rate of fifty guineas per annum. On Friday, the 18th of September, 1835, the plaintiff left the service of the defendant; the cause of his so doing did not appear on the trial, but in a conversation which the defendant had with a sister of the plaintiff, on the following day, the former alleged that the plaintiff had sent a wrong medicine, by mistake, to a patient. Some correspondence then took place, and on Monday, the 21st September, the plaintiff tendered his services to the defendant, who refused them, and on the 22d the present action was commenced. The learned judge, on

this state of facts, left two questions to the jury; 1st, was the plaintiff hired for a year or generally, which would amount in law to a hiring for a year; or was his hiring subject to be put an end to upon a quarter's notice being given? 2dly, was the plaintiff in fact dismissed by the defendant from his service? The jury found that the contract between the parties was a general hiring, but subject to be determined upon a quarter's notice being given, and that the plaintiff was in fact dismissed from the service of the defendant on the 19th of September. Upon this finding, the learned judge was of opinion that the contract set forth in the first count, which was an absolute contract for a year certain, was disproved, and directed a verdict to be entered for the defendant, reserving leave, however, for the plaintiff to move this Court to enter a verdict on the second count, for a quarter's salary, or a quarter's salary minus the 4*l.* paid into Court, if the Court should think he was entitled to have the verdict so entered, upon a general indebitatus count, for work and labour, on the authority of *Gandell v. Pontigny (a)*, and a rule was accordingly obtained, in Easter term, 1836, against which

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Kelly now shewed cause. The action was commenced too soon. If the plaintiff was improperly dismissed, he may have an action for that. The contract in the first count was disproved. It was said, however, that in *Gandell v. Pontigny (a)*, it was decided by Lord *Ellenborough*, that where a servant is hired by the quarter, and is discharged by his master without sufficient cause, in the middle of a quarter, he may recover a quarter's wages, under a count in indebitatus assumpsit, for work and labour. It is difficult to understand how a count for work and labour, under which a quarter's salary is sought to be recovered, can be maintained, by shewing that the party was ready to work for a part of the quarter, but did not work for the rest, although

(a) 4 Camp. 375; S. C. 1 Stark. N. P. C. 198.

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he was willing so to do. *Archard v. Hornor* (a) is directly contrary to *Gandell v. Pontigny* (b); in that case it was held by Lord Tenterden C. J., that on an indebitatus count for work and labour, the plaintiff can only recover for the time he has actually served. This Court seems to have entertained the same opinion in *Ridgway v. The Hungerford Market Company* (c), although there was no express decision on the point. However that may be, assuredly the quarter's salary cannot be recovered until the quarter has expired. In the present case, after the plaintiff had been dismissed, he might have been taken back again into the service.

Gunning, in support of the rule. *Gandell v. Pontigny* (b) was recognized in *Collins v. Price* (d), and those two cases were not cited by Lord Tenterden, in *Archard v. Hornor* (a). In *Pagani v. Gandolfi* (e) an agreement was entered into for the employment of a clerk, for four years, from the 1st of January, 1823, at a salary of 400*l.* a year. The salary was paid up to the 1st of January, 1825. In July, 1825, the clerk was dismissed from his employment, and in Michaelmas term, 1825, he commenced an action. It was objected at the trial, that though he might have been wrongfully dismissed, his salary was not due at the commencement of the action. *Best* C. J., was however of opinion that he was not bound to wait till the end of the year.

Lord DENMAN C. J.—The ground on which the rule was granted, was to bring the case of *Gandell v. Pontigny* (b) in question. Had that case not existed, the Court would not have granted the rule. In that case, Lord *Ellenborough* determined, that as the servant had served a part of the quarter, and was willing to serve the residue, in

(a) 3 C. & P. 349.

(b) 4 Camp. 375; S. C. 1 Stark.
 N. P. C. 198.

(c) 4 N. & M. 797; S. C. 3 A.

& E. 171.

(d) 5 Bing. 132.

(e) 2 C. & P. 370.

contemplation of law he might be considered to have served the whole. Lord *Tenterden* took an opposite view of the question, in *Archard v. Hornor* (a). If I was bound to make choice between those two cases, I should choose the latter case, because it is founded on much better reason. Here, however, the same question does not arise, because the plaintiff has brought his action before the quarter expired for which he claims to be paid, and he might have been received back again into the service from which he had been dismissed.

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PATTESON J.—None of the cases clash with the decision in *Archard v. Hornor* (a), except *Gandell v. Pontigny* (b). For *Collins v. Price* (c) is certainly not inconsistent with it, but the ruling in the former case really does not come in question. This action was commenced on the 22d September, and money has been paid to meet the actual services up to that time. This is therefore an action on an executed contract, founded upon a prospective consideration. The plaintiff claims for work and labour done and performed, and he has been paid for all that he has actually done, how then can he maintain this form of action for labour, which may or may not have been performed by him? Assuming that the second quarter had elapsed before the commencement of the action, and I were called upon to decide between *Gandell v. Pontigny* (b) and *Archard v. Hornor* (a), I should prefer the latter authority.

COLERIDGE J.—The second count was for work and labour done and performed, to which there were two pleas: 1st, non assumpsit; 2dly, that sufficient money was paid into Court to pay for the work done. Mr. *Gunning* relies on *Gandell v. Pontigny* (b). Assuming that case to be good

(a) 3 C. & P. 349.

kie's N. P. C. 198.

(b) 4 Camp. 375; S. C. 1 Star-

(c) 5 Bing. 132.

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he was willing so to do. *Archard v. F* work is in
contrary to *Gandell v. Pontigny* (b) performance;
held by Lord Tenterden C. J., th. maintain his
for work and labour, the pla was to perform
time he has actually serve not elapsed be-
entertained the same opi, therefore, without
ford Market Company Pontigny (a), although
decision on the po this rule must be discharged.
the quarter's sale
has expired. Rule discharged.
been dismiss

the service .mp. 375; S. C. 1 Starkie's N. P. C. 198.

G.

W.

MOORE v. BUTLIN.

ASSUMPSIT for goods sold and delivered, work and labour, money paid, and on an account stated. The defendant pleaded, 1, except as to 10*l.* 2*s.* 9*d.* parcel &c., non assumpsit; 2, as to the causes of action in the introductory part of the first plea mentioned, that the plaintiff was and is indebted to the defendant in a larger sum, for money had and received, and on an account stated; 3, pay-
ment, after its publication.

2. To a declaration for goods sold and delivered, work and labour, money paid, and on an account stated, the defendant pleaded, 1, non assumpsit, except as to 10*l.* 2*s.* 9*d.*; 2, set-off to a larger amount, for money had and received by the plaintiff to the use of the defendant, and on an account stated; 3, as to 10*l.* 2*s.* 9*d.* payment into Court. The plaintiff joined issue on the first and second pleas, and to the last replied damages ultra. By an order at nisi prius, the cause and all matters in difference were referred to an arbitrator, who awarded, that on both the issues, so far as the same applied to the first, second, and fourth counts of the declaration, the verdict should be entered for the plaintiff; and so far as they applied to the third count (for money paid), the verdict should be entered for the defendant. He assessed the plaintiff's damages on the issues found for him, at 19*l.* 5*s.* 1*d.*:—Held, that the arbitrator was mistaken, in finding that a verdict should be entered for the defendant on the second issue (that of set-off), as to the third count only; because the plea of set-off is not divisible, it is pleaded to the whole action, and unless the set-off equals the aggregate of the plaintiff's demand, a verdict cannot be found for the defendant on a single count, because it equals the demand on that count. But as such finding was in favour of the defendant, he could not avail himself of that mistake to set aside the award; nor had the Court power to correct the award, so as to prevent the plaintiff from paying the costs of the issue found for the defendant.

of 102*l.* 2*s.* 9*d.* Issue joined on first and last plea the plaintiff replied damages *in prius*, dated 14th February, 1837, at, with the consent of the parties, verdict for the plaintiff, damages, the award of an arbitrator, *in all matters in difference* between were thereby referred; the costs to arbitration of the arbitrator, and the costs of at his discretion.

Arbitrator made his award, dated 27th April, 1837, the following terms:—"I do award, adjudge and determine, that instead of the verdict entered as aforesaid, the verdict shall be entered as follows; that is to say, on both the issues joined between the parties, so far as the same apply to the several counts of the declaration in the said cause, except the count for money paid, the verdict is to be entered for the plaintiff; and so far as the same apply to the said count for money paid, the verdict is to be entered for the defendant. And I assess the plaintiff's damages, on the issues found for him, at the sum of 19*l.* 5*s.* 1*d.* And I direct that the damages found by the jury shall be reduced to that sum. And I award and declare that neither of the parties has any claim against the other of them, for or in respect of any matters in difference between them. And I award that the costs of the said reference, and of this my award, shall be paid by the said defendant." The award was taken up by the plaintiff, and a copy served on the defendant on the following day.

A rule nisi had been obtained, on the 6th of May, calling upon the plaintiff to shew cause why the award should not be set aside, on the ground, 1. That the award is bad, uncertain and inconsistent, in awarding that on both the issues joined between the parties, so far as the same apply to the several counts of the declaration in this cause, except the count for money paid, the verdict is to be entered for the plaintiff, and so far as the same apply to the said count

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law, the result is, that a readiness to perform work is in contemplation of law the same as an actual performance; assuming that to be so, the servant cannot maintain his action until the quarter, during which he was to perform the work, has expired. That quarter had not elapsed before the present action was commenced, therefore, without touching the authority of *Gandell v. Pontigny (a)*, although I am far from agreeing with it, this rule must be discharged.

Rule discharged.

(a) 4 Camp. 375; S.C. 1 Starkie's N. P. C. 198.

Monday,
 Nov. 20th.

MOORE v. BUTLIN.

1. Where a cause and all matters in difference are referred at nisi prius, a motion to set aside the award is not too late, although made more than four days in the term, after its publication.

ASSUMPSIT for goods sold and delivered, work and labour, money paid, and on an account stated. The defendant pleaded, 1, except as to 10*l.* 2*s.* 9*d.* parcel &c., non assumpsit; 2, as to the causes of action in the introductory part of the first plea mentioned, that the plaintiff was and is indebted to the defendant in a larger sum, for money had and received, and on an account stated; 3, pay-

2. To a declaration for goods sold and delivered, work and labour, money paid, and on an account stated, the defendant pleaded, 1, non assumpsit, except as to 10*l.* 2*s.* 9*d.*; 2, set-off to a larger amount, for money had and received by the plaintiff to the use of the defendant, and on an account stated; 3, as to 10*l.* 2*s.* 9*d.* payment into Court. The plaintiff joined issue on the first and second pleas, and to the last replied damages ultra. By an order at nisi prius, the cause and all matters in difference were referred to an arbitrator, who awarded, that on both the issues, so far as the same applied to the first, second, and fourth counts of the declaration, the verdict should be entered for the plaintiff; and so far as they applied to the third count (for money paid), the verdict should be entered for the defendant. He assessed the plaintiff's damages on the issues found for him, at 19*l.* 5*s.* 1*d.*:—Held, that the arbitrator was mistaken, in finding that a verdict should be entered for the defendant on the second issue (that of set-off), as to the third count only; because the plea of set-off is not divisible, it is pleaded to the whole action, and unless the set-off equals the aggregate of the plaintiff's demand, a verdict cannot be found for the defendant on a single count, because it equals the demand on that count. But as such finding was in favour of the defendant, he could not avail himself of that mistake to set aside the award; nor had the Court power to correct the award, so as to prevent the plaintiff from paying the costs of the issue found for the defendant.

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ment into Court of 10*l.* 2*s.* 9*d.* Issue joined on first and second pleas; to the last plea the plaintiff replied damages ultra. By order of nisi prius, dated 14th February, 1837, it was ordered by the Court, with the consent of the parties, that the jury should find a verdict for the plaintiff, damages 200*l.*, and costs 40*s.*, subject to the award of an arbitrator, to whom the said cause, *and all matters in difference* between the said parties, were thereby referred; the costs to abide the determination of the arbitrator, and the costs of the reference at his discretion.

The arbitrator made his award, dated 27th April, 1837, in the following terms:—"I do award, adjudge and determine, that instead of the verdict entered as aforesaid, the verdict shall be entered as follows; that is to say, on both the issues joined between the parties, so far as the same apply to the several counts of the declaration in the said cause, except the count for money paid, the verdict is to be entered for the plaintiff; and so far as the same apply to the said count for money paid, the verdict is to be entered for the defendant. And I assess the plaintiff's damages, on the issues found for him, at the sum of 19*l.* 5*s.* 1*d.* And I direct that the damages found by the jury shall be reduced to that sum. And I award and declare that neither of the parties has any claim against the other of them, for or in respect of any matters in difference between them. And I award that the costs of the said reference, and of this my award, shall be paid by the said defendant." The award was taken up by the plaintiff, and a copy served on the defendant on the following day.

A rule nisi had been obtained, on the 6th of May, calling upon the plaintiff to shew cause why the award should not be set aside, on the ground, 1. That the award is bad, uncertain and inconsistent, in awarding that on both the issues joined between the parties, so far as the same apply to the several counts of the declaration in this cause, except the count for money paid, the verdict is to be entered for the plaintiff, and so far as the same apply to the said count

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for money paid, the verdict is to be entered for the defendant. 2. That the arbitrator having directed the verdict on the first issue, so far as the same applies to the count for money paid, to be entered for the defendant, ought not to have directed the verdict on the second issue to be entered for the defendant, merely so far as that issue relates to the count for money paid; but if he thought the defendant entitled to a verdict on any part of the second issue, he ought to have directed the verdict on the second issue to be entered for the defendant generally, or for some certain sum of money, and not to have ordered a verdict to be entered for the plaintiff on the second issue, except so far as it relates to the count for money paid. 3. That the arbitrator had no power or authority to confine the verdict for the defendant on the second issue, to so much thereof as applies to the count for money paid.

Cresswell and *Swann* shewed cause, in Trinity term. This motion is to set aside an award, under an order of *nisi prius*. The rule has therefore been obtained too late; the application should have been made within the four first days of Easter term next after the making of the award; *Thompson v. Jennings* (a), *Rawsthorn v. Arnold* (b). The case of *Allenby v. Proudlock* (c) will be cited on the other side, but that differs from the present. In that case a verdict was taken for the plaintiff, all matters in difference were referred to the arbitrator, and the arbitrator did in fact determine several matters not on the record. On this the reasoning of Mr. Justice *Culderidge*, in his judgment, proceeded. Here the arbitrator has decided nothing, except on the issues raised on the record. This, therefore, is a case in which the old rule applies, and the motion to set it aside, like that for a new trial, should have been made within the first four days of term. *Hayward v. Phillips* (d)

(a) 10 Moore, 110.

(c) 4 Dow. P. C. 54.

(b) 9 D. & R. 556; S. C. 6 B.

(d) 1 N. & P. 288,

& C. 629.

was similar to *Allenby v. Proudlock* (a). *Lyng v. Sutton* (b) is directly in point. The award is not uncertain or inconsistent. This was a declaration with several counts; the general issue was pleaded, and, to part, a set-off. The arbitrator finds that the plaintiff has a demand for goods sold, work and labour, and on an account stated, but none for money paid. The arbitrator has then treated the general issue and the set-off as divisible pleas, thus raising as many issues on each plea as there are counts in the declaration. Suppose the plea of set-off had been repeated as to each count severally, there would then have been no inconsistency, and that is in effect the way in which the arbitrator has treated the pleadings. Here is, at all events, no such uncertainty as to leave any doubt as to the effect of the decision, nor any thing left undecided; and the Court will therefore not set the award aside. The result of it is, that on the whole accounts between the plaintiff and the defendant, there is a balance of 19*l.* 5*s.* 1*d.* remaining due to the plaintiff. If the arbitrator thought the defendant had in any respect established a set-off, he has allowed it fairly out of the plaintiff's demand.

Sir *J. Campbell* A. G. and *Peacock*, contra, were stopped by the Court, as to the first point. [Lord *Denman* C. J. We think the motion made in time, being a reference of all matters in difference. *Littledale* J. There is a reason why new trials should be moved for within the first four days of term; it is because the greatest part of the causes are tried in vacation, which gives plenty of time, except in a few cases. But with regard to awards, it may be a long time before the parties know what the arbitrator has decided.] This declaration consists of four counts, goods sold and delivered, work and labour, money paid, account stated. Omitting the sum of 102*l.* 2*s.* 9*d.*, which was paid into Court, there are, as to the remainder, two pleas pleaded

(a) 4 Dow. P. C. 54.

(b) 5 Dow. P. C. 39. See also *Martin v. Burge*, 6 N. & M. 201.

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to each count; non assumpsit and set-off. Issue is joined on all. The verdict is entered generally for the plaintiff. The arbitrator has awarded in his favour on both the issues joined, on all the counts except money paid. Therefore, on the first three counts, the verdict is entered for the plaintiff on the general issue, that is, that the plaintiff had a good cause of action; and also on the set-off, that is, that the defendant had no good cross demand. If therefore the defendant had in fact any set-off, he is deprived of the benefit of it on these three counts. But from the award on the count for money paid, it appears that the defendant had a set-off. There the arbitrator pronounces on the general issue, that the plaintiff *had not* a good cause of action, and on the plea of set-off, that the defendant had a good cross demand. Therefore on the only count on which he finds that the defendant had a set-off, he deprives him of the benefit of it, because on that count he likewise finds in his favour on the general issue. The award is therefore bad on the face of it. If the arbitrator found for the defendant at all on the issue of set-off, he ought to have applied that set-off to one of the counts on which he finds the general issue for the plaintiff. It is not only inconsistent, but unjust. It orders that a sum which the plaintiff owes the defendant, shall be set off against a sum which the defendant *does not* owe the plaintiff. If the plaintiff owed the defendant nothing, the verdict on that plea should have been for the plaintiff generally; if he owed him any thing, it should have been on some count on which the defendant might have had advantage from it. The costs of the action are to abide the event; and it is this which makes the material difference to the defendant, in the manner in which the issues are found; for the consequence is, that the defendant gains nothing by his plea of set-off, that issue being against him on three counts. [*Little-dale J.* The award, as regards the set-off, is informal throughout. It is a general counter-claim, and should have been deducted from the general sum awarded to the plain-

tiff.] It is also inconsistent, for it admits the existence of a set-off, and denies the defendant the benefit of it. It is as if he had entered on the *postea*, that the jury find, as to the set-off, that the plaintiff was indebted to the defendant in manner and form, &c. and then applied that finding to the count on which they have already found that the defendant is not indebted to the plaintiff. (*Peacock* also referred to the case of *Ryder v. Fisher* (a), decided this term in the Common Pleas.)

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Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.—This was an action of *assumpsit*. The declaration contained counts for goods sold and delivered, work and labour, money paid, and on an account stated. The defendant pleaded to the whole declaration, 1st, non *assumpsit*; 2d, a set-off; to which the plaintiff replied *nil debet*. The cause and all matters in difference were referred. The arbitrator has ordered a verdict to be entered on both pleas, so far as they relate to the count for money paid, for the defendant; and so far as they relate to the residue of the declaration, for the plaintiff, with 19*l.* 5*s.* 1*d.* damages. A rule *nisi* has been obtained to set aside this award, on the ground that the issue on the plea of set-off is not divisible; and we are of opinion that it is not. The defendant, by that plea, admits something to be due on each count of the declaration, and undertakes to prove a cross demand exceeding the aggregate amount of the sums so due. The issue under *nil debet* is not whether *any* sum is due from the plaintiff, but whether a sum is due from him exceeding or equalling the aggregate amount of his demands. Unless such a sum is due, the plea would be no bar to the action, although the evidence might reduce the damages. The arbitrator has evidently so treated the issue; for although, by the verdict as to the count for money paid, he finds that some set-off was proved, yet, by the rest of the verdict, he finds

(a) Not yet reported.

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that it does not equal the aggregate demands of the plaintiff on the other counts. And in this he is quite right, if the plea was to be held divisible and applicable to each count separately; otherwise this absurdity might follow, that the demand of the plaintiff on each count, taken by itself, might be less than the set-off, so that the defendant would be entitled to a verdict on the whole of that plea, and yet the aggregate amount of the plaintiff's demands might far exceed the set-off, and so the set-off would be no bar to the action.

For these reasons we are of opinion, that as the set-off is pleaded to the whole, the issue on it is a single one, and that the plaintiff is entitled to a verdict, unless the defendant proves a set-off exceeding or equalling the whole of the plaintiff's aggregate demands, without regard to the particular amount under each count, or to any other issue on the record, applying only to a particular count. And this view of the question will not prevent the defendant from availing himself of any other defence stated on the record; such as payment, or the Statute of Limitations; by which he may be able so to reduce the plaintiff's aggregate demand, as that his set-off may cover the remainder, for to that extent the plea of set-off is divisible; or rather it must be found wholly for the defendant, and not partly for him and partly for the plaintiff. And there is no absurdity in this; for as the precise sums, both in the declaration and the plea, are immaterial, it signifies not whether the plaintiff's demand be reduced by failure of proof, or by the establishment of one or more of the other pleas on the record, independent of the plea of set-off. If by either means the plaintiff's demand ultimately established falls short of the defendant's demand, the issue on the plea of set-off ought to be found wholly for the defendant, so that in no case can the plea of set-off be properly said to be divisible. But though we think that the arbitrator is mistaken in his view of the effect of the pleadings, yet we are of opinion that the party, in whose favour that mistake

has been made, viz. the defendant, cannot avail himself of it to set aside the award. We have no power to correct the award, and therefore, if the plaintiff wishes it, this rule must be made absolute; if he is content to pay the costs of the issue so wrongly found for the defendant, the rule must be discharged. The same course was pursued, in very similar circumstances, in *Ward v. Dean (a)*. The record may be erroneous, but by the order of reference no writ of error can be brought, and the merits are in no respect affected.

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The plaintiff having consented to pay the costs of the issue found for the defendant,

Rule discharged.

(a) 3 B. & Ad. 234.

TODD v. JEFFERY.

Monday,
Nov. 13th.

IN this case *Wightman* had obtained a rule nisi to enter a nonsuit, under the following circumstances:

In March, 1836, the case was tried before the sheriff of Northamptonshire, when the plaintiff obtained a verdict, and leave was given to the defendant to move to enter a nonsuit, on the ground that evidence had been improperly received. In Easter term, 1836, a rule nisi was obtained in the Bail Court, before *Littledale J.*, which was argued in the following Trinity term, before *Coleridge J.*, in the Bail Court, who made the rule absolute, and judgment of nonsuit was signed. In Michaelmas term following, *Coleridge J.* was applied to in the Bail Court, to allow the rule to be opened and discussed before the four judges in the other Court. This request was acceded to, and *Wightman* obtained a rule nisi accordingly; against this rule,

A rule in the Bail Court will not be permitted to be re-opened and argued in the full Court in the term after judgment has been pronounced, although the judge who heard the case sanctions the application to the full Court.

Sir *W. W. Follett* and *Butt* now shewed cause. The 11 *Geo. 4*, and 1 *Will. 4*, c. 70, s. 1, provides that "one of

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the judges of either of the said Courts, when occasion shall so require, while the other judges of the same Court are sitting in Banc, to sit apart from them, for the business of adding and justifying special bail, discharging insolvent debtors, administering oaths, receiving declarations required by statute, hearing and deciding upon matters on motion, and making rules and orders in causes and business depending in the Court to which the judge shall belong, *in the same manner, and with the same force and validity*, as may be done by the Court sitting in Banc." A judgment in the Bail Court therefore is conclusive, and cannot be reviewed by this Court; *The King v. The Sheriff of Devon* (a), *Rosset v. Hartley* (b). If the judge in the Bail Court directs his judgment to be reviewed by this Court, that cannot give this Court jurisdiction. [Lord Denman C. J. Might not that be done in the same term?] Here, the term had expired. This is an attempt to make this Court a Court of Error, or appeal from the Bail Court.

Cresswell and *Wightman*, in support of the rule. This Court has a discretionary power to reopen a rule, and as the judge who decided the case wishes the rule to be reopened, this Court will not hesitate to do so. *De Rützen v. Lloyd* (c) is an authority to shew that this Court will reopen one of the rules pronounced in this Court, and there is no reason why the judge in the Bail Court should not have the same power. In *The King v. The Sheriff of Devon* (a), the judge in the Bail Court refused to allow the application to be made to this Court.

LORD DENMAN C. J.—This Court will alter its own rule in the same term, and where great misconception respecting the terms of it has taken place. But these circumstances do not occur in the present case. Where the judge in the Bail Court has pronounced a judgment, I do

(a) 2 A. & E. 296.

(c) 5 A. & E. 456.

(b) 5 N. & M. 415.

not think any wish he may express, from a doubt of the correctness of his decision, to have the case argued here, can give this Court any jurisdiction to rehear the case, after the term has expired in which judgment was pronounced. It would be extremely inconvenient if we were to decide that we had authority to review the decisions pronounced in the Bail Court.

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PATTERSON J.—The words of the statute (*a*) are, “that it shall and may be lawful for any one of the judges of either of the said Courts, when occasion shall so require, while the other judges of the same Court are sitting in Banc, to sit apart from, for the business of adding and justifying special bail, discharging insolvent debtors, administering oaths, receiving declarations required by statute, hearing and deciding upon matters on motion, and making rules and orders in causes and business depending in the Court to which such judge shall belong, *in the same manner, and with the same force and validity*, as may be done by the Court sitting in Banc.” We must treat a rule pronounced in the Bail Court precisely the same as a rule pronounced in this place. It is for the benefit of all parties that there should be no pretence for coming to this Court to have the judgment in the Bail Court reviewed.

WILLIAMS J. and COLERIDGE J. concurred.

Rule discharged.

(*a*) 11 *Geo. 4*, and 1 *Will. 4*, c. 70, s. 1.

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EMMERSON v. SALTMARSH, BROOM, and others (a).

A rate made
by commis-
sioners of sew-
ers upon a
township at
large is bad.

REPLEVIN for distraining the plaintiff's goods in his dwelling-house, in the parish of Elvington, in the county of York. The defendants avowed and made cognizance under the authority of a commission of sewers, issued under 23 Hen. 8, c. 5. At the trial, at the spring assizes at York, 1835, before *Parke B.*, a verdict was found for the plaintiff, with 3*l.* damages, subject to the opinion of the Court upon the following case:

The plaintiff, at the time of the distress being made, was constable of the township of Elvington, in the county of York, and was then, and had been for fourteen years previously, the occupier of about forty-four acres of land in that township. The defendant *Broom* was bailiff of the other defendants, who are commissioners of sewers, appointed by his majesty's commission, dated the 12th day of July, 1833, for Howdenshire, in the west part of the East Riding of the county of York, within which parts the township of Elvington is locally situated. The case then set out the commission, which, after enjoining the commissioners to inquire by the oaths of the honest and lawful men of the said county, place or places, where the defaults and annoyances be, proceeded thus: "and who hath or holdeth any lands or tenements, or common of pasture, or profit of fishing, or hath or may have any part, loss or disadvantage, by any manner of means in the said places, as well near to the said dangers, lets and impediments, as inhabiting or dwelling thereabouts by the said walls, ditches, banks, gutters, gates, sewers, trenches, and other the said impediments and annoyances; and all those persons and every of them, to tax, assess, charge, distrain and punish, as well within the metes, limits and bounds of old time accustomed or otherwise, or elsewhere within this our

(a) This case was decided in Trinity term last (June 12), but has been unavoidably postponed.

realm, after the quantity of their lands and tenements and rents, by the number of acres and perches, after the rate of every person's portion, tenure or profit, or after the quantity of their common of pasture or profit of fishery, or other commodities there, by such ways and means, and in such manner and form, as to you shall seem most convenient."


On the 14th December, 1833, the commissioners held a court of sewers at Howden, in the county of York, and then made a rate or assessment on several townships (of which Elvington was one), and ordered the constables of the several townships respectively to pay the sum of money assessed upon each township, on or before the 1st day of March then next.

At a court of commissioners of sewers, held April 26, 1834, an order was made upon the constable of Elvington (the plaintiff) to appear at the next court of sewers, to shew cause why the sum of 4*l.*, rated or assessed upon the said township, as above mentioned, had not been paid, pursuant to the order of the said court. The plaintiff appeared personally, and refused to pay the rate, whereupon, on the 23d August, 1834, the goods and chattels of the plaintiff were distrained, by virtue of a warrant from the defendants. The warrant, after reciting that the township of Elvington had been rated at the sum of 4*l.*, recited that *George Emmerson* (the constable of the said township), being an inhabitant and holder of certain lands and tenements within the said township, and a party subject and liable to pay and contribute towards the said rate and assessment, had refused to pay the said sum of 4*l.*

The earliest commission of sewers for the district in question, which is preserved amongst the proceedings of the court, was in the eighth year of the reign of *Queen Anne*, and similar commissions (in the whole amounting to fourteen) appear to have been granted, from time to time, till the commission by which the present defendants were appointed commissioners. It also appears by the books of the commissioners, that from 1725 to the present time,

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rates or assessments have been made by the commissioners acting under the said commissions, upon the same townships, and in the same relative proportions as the assessment of the 14th of December, 1839, but for different amounts. It further appears by the same books, that the following payments of rates have been made by or for the township of Elvington, (that is to say,)

	f.	s.	d.
In 1725, Elvington	1	0	0
1728, do.	1	0	0
1748, do.	1	0	0
1759, do.	1	6	8
1828, do.	2	0	0
1831, do.	4	0	0

And that the two last-mentioned of those payments were made after orders of court for the payment thereof made, and under threat of a distress upon the constable. It also appears from the books and proceedings of the commissioners, that an order was made on the 22d of August, 1778, requiring the attendance of several inhabitants of Elvington, Barnby, and other places, at the next court of sewers, to shew cause why their assessments had not been paid; and that by an order of the court, dated the 24th day of October, in the same year, a warrant of distress for levying a rate was issued against the inhabitants of Elvington. From 1725 to the commencement of the present action, no instance, with the above exception, has been produced or proved, wherein disobedience to an order made upon the constable, for the rate laid by the commissioners upon the entire township, has been followed by a warrant of distress upon his goods and chattels, but no entry or account of the receipts of the rates from 1778, until the appointment of the present clerk, in 1831, has been kept; and no instance has been produced or given of disobedience by a constable, to any order of the commissioners, for the payment of a rate, until the occasion of the present distress. The case then set out a private act of parliament, connected with the

drainage of the district, and for improving the River Darwent, which, after giving the commissioners jurisdiction over the river, provided that the said undertakers (of the navigation), their heirs and assigns, are to bear the whole charge of the opening, cleansing and scouring the said river of Darwent.


The River Darwent runs by the side of the township of Elvington. If the banks of the Darwent were suffered to go down, some parts of the township would be overflowed by the river, but not the plaintiff's lands, which are on the high ground, so much above the level of the river, that they cannot be injured by any floods from it.

There are two or three dikes or drains (one of which is called the Kexby drain) in that township, into which part of the lands in the township drain; those dikes empty themselves into the River Darwent, and are under the survey and jurisdiction of the commissioners of sewers; part of the lands occupied by the plaintiff drains into the Kexby drain, and the other part into a drain, not a plain dike, but which also runs into the Darwent. The Kexby drain runs by one side of the plaintiff's house. If those drains were stopped up, the water would flow back on the plaintiff's land. The commissioners of sewers have never, within the memory of man, maintained, repaired, or cleansed any of the drains or sewers in the township of Elvington, all such drains and sewers have been, and still are, cleansed, maintained and supported, by the occupiers of adjoining lands, but the commissioners of sewers have surveyed such drains and sewers from time to time, and have set pains on the occupiers of lands adjoining, in order to compel the cleansing and repairing of the same.

The River Darwent is maintained, cleansed and supported under the provisions of the said act. The banks are repaired by the occupiers of the adjoining lands, and the commissioners of sewers have viewed four or five years ago. The commissioners under the statute of *Anne* have never interfered with the banks of the Darwent. These

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commissioners do not act at all, only five or six of them survive. Part of the lands, comprising about 100 acres, in the township of Elvington, are occasionally flooded by water from the River Darwent, and the remainder are much higher, and not so subject to be flooded. The lands occupied by the plaintiff are in the high parts of the township, and would not be overflowed by water even if the banks of the River Darwent were thrown down. The township of Foggathorpe is a township in the parish of Bubwith, within the jurisdiction of the court of sewers. The parish of Bubwith comprises the following townships, viz. Spaldington, Bubwith, Foggathorpe, Havlethorpe, Griphorpe, Willitof, and Breighton. Foggathorpe is not introduced into the general rate or assessment laid by the commissioners on the 14th of December, 1833.

If the Court is of opinion that the distress made upon the goods of the plaintiff, under the above circumstances, is illegal, then the verdict for the plaintiff is to stand, otherwise a verdict to be entered for the defendants, it being understood that both parties are at liberty to refer to the pleading in the cause, and the above-mentioned statute, 12 *Anne*, as part of the case.

Alexander, in Trinity term (a), argued the case for the plaintiff. The question is, whether a rate made on a whole township *eo nomine* can be sustained. It is clear, from a series of cases, that it cannot, though *Callis*, p. 192, et seq. expresses a strong opinion to the contrary. That opinion, however, cannot be supported. The words of the 23 *Hen.* 8, c. 5, s. 3, shew clearly that it is only upon individuals that the assessment is to be made, and not upon a district at large. The first case upon the subject is that of *The Isle of Ely* (b), where one of the questions was, whether a rate on a district is good, and it was resolved by

(a) Friday, May 26, before Lord in the Bail Court.

Denman C. J., *Littledale* and *Pat-* (b) 10 Rep. 141 a.
*teson J.*s.; *Williams J.* was sitting

Coke C. J., Daniel and Foster Js., that it was not. Mr. *Fraser*, the last editor of the reports, has collected the cases on the subject in a note (a), and cites the reasoning of Lord *Ellesmere C.* to the contrary, "For if a sudden inundation of the sea happens, and the walls and banks against the sea be carried away by the sudden violence of the stream, if the commissioners of sewers shall stay their taxation for the repairs till every man's lands be known, the whole country haply may be drowned." But the case supposed by Lord *Ellesmere* ought never to arise, as the commissioners ought to know enough of the country beforehand, to be able to lay a legal tax upon the inhabitants at once. *Hetley v. Boyer* (b), *Custodes v. The Inhabitants of Outwell* (c), *Bow v. Smith* (d), all shew that this rate is bad, and *Masters v. Scroggs* (e) shews that the party who is rated must be directly interested. That never can be ascertained, if a rate may be made on a township including high and low lands indiscriminately. [*Patteson J.* Even if the rate on the whole township were good, I do not see how it could be levied on one individual, as in this instance; for the case states, that in consequence of the plaintiff refusing to pay the rate on behalf of the district, the rate was levied upon him as an inhabitant and holder of certain lands within the township.] Undoubtedly it could not; there is no power to make one individual responsible for the default of the township.

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Cresswell, contra. The course of rating has been followed without objection since the year 1725, which is the date of the earliest commission that has been preserved. The first question is, what lands are liable to be rated. Now it is clear from *Callis*, p. 222, "all such which reap profit, or sustain damage, shall be assessed;" and the case

(a) 10 Rep. 143 n, n. (E).

(c) Style, 185; Vin. Abr. Sew-

(b) Cro. Jac. 336; Vin. Abr. ers, (B).

Sewers, (E 1).

(d) 9 Mod. 94.

(e) 3 M. & S. 447.

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finds that if the drains under the jurisdiction of the commissioners were stopped up, the water would flow back on the plaintiff's land. In the *Case of the Level of Hull* (a) it was held, that an acre rate, which is of the same nature as the present rate, was good. The doctrine, therefore, laid down by *Callis*, who is of the highest authority on this subject, that a rate on a township is good, is confirmed by this case, and *Callis* had the opposite doctrine laid down in the *Case of the Isle of Ely* (b) before his eyes when he wrote, and he goes into the subject at length. Lord Chief Baron Comyn also adopts the law as laid down by *Callis*, without any quære (c). *Callis*, p. 128, also cites a ruling of *Coke* C. J., in opposition to the law he had laid down previously in the *Case of the Isle of Ely* (b). The opinion of Lord Ellesmere is entitled to great weight, as on principle it is unanswerable. And in *Moore*, 824, it appears that the Lords of the Council, on report from the Attorney-General, found that it stood neither with "law nor common sense," that the commissioners could not impose a tax upon a township. *Hetley v. Boyer* (d) is a very different case from the present, for there the commissioners of sewers assessed a fine upon the village of A., and ordered it to be levied on one individual; it was not therefore the case of a rate at all. It is clear from the instances collected by *Callis*, p. 124, that it was by no means uncommon in the old law to assess or amerce a township generally, in which case the levy might be on the goods of any person of the town; and he cites instances from *Lib. Assiz.* and decisions on the Statute of Winton. The plaintiff here has never called on the commissioners to apportion the assessment, and he does not even shew that there is any other individual in the township liable except himself; therefore, for aught that appears, he may be liable to pay the whole rate. This Court decided, in *Soady v. Wilson* (e), that where a party

(a) 2 Str. 1127.

(d) Cro. Jac. 336.


(b) 10 Rep. 141 a.

(e) 4 N. & M. 777; 3 A. & E.

(c) Com. Dig. Sewers, (E 2).

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is liable to be rated, the King's Bench would not enter into the question of the quantum of the rate. That principle applies entirely here. The proper distinction to be taken on this subject is, that the commissioners may make the rate on the township, but they must levy the rate at their peril, on the party benefited only; *Case of the Level of Hull(a)*.

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Alexander, in reply. The last case cited does not appear to have been much discussed. An acre tax however may be good, for it may distinguish between low lands and lands too high to be benefited by sewerage, and for that reason perhaps the Court would not determine the tax to be bad in *Commissioners of Sewers v. Newburg(b)*. [*Paterson J.* Have you referred to the case cited by *Callis* in the Book of Assizes? I do not know whether it is a case of sewers' rate, but it would rather appear not(c).]

Cur. adv. vult.

LORD DENMAN C. J., in Trinity term last, delivered the judgment of the Court.—The question in this case is, whether a rate or assessment can be made by the commissioners of sewers upon a whole township. And it will be proper, in the first instance, to advert to the commission of sewers itself, to see all the powers of the commissioners.

They are to inquire, by the oaths of honest lawful men of the county, place or places, where default or annoyances, or through whose default the hurts and damages have happened, and who hath or holdeth any lands or tenements,

(a) 2 Str. 1127.

(b) 3 Keble, 827.

(c) The book cases, 37 Lib. Ass. pl. 10, and 38 Lib. Ass. pl. 15, appear to have been founded on commissions issued from the crown, on the authority said by Sir E. Coke, 10 Rep. 141 a, to be

inherent in the crown, before any statute had passed on the subject. The first commission was to inquire by whom a watercourse, that was stopped up, should be cleansed; the second, by whom a bridge should be repaired,

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or hath or may have any hurt, loss or disadvantage, by any manner of means, in the said places, as well near to the said dangers, lets and impediments, as inhabiting or dwelling thereabouts, by the said walls, ditches, banks, &c. and other the impediments and annoyances; and all those persons, and every of them, to tax, assess, charge, distrain and punish, as well within the metes, limits and bounds of old time accustomed as otherwise, or elsewhere within the realm, after the quantity of their lands, tenements and rents, by the number of acres and perches, after the rate of every person's portion, tenure or profit, or other commodities there, by such ways and means, and in such manner and form, as to them, or six of them, whereof three of the quorum shall always be three, shall seem most convenient to be ordained and done for redress and reformation, to be had in the premises.

Now such being the effect of the commission in the *Case of the Isle of Ely* (a), it is stated to be clearly resolved, that the tax generally of a several sum in gross upon a town, is not warranted by the commission of sewers, but ought to be particular, according to the express words, upon every owner or possessor of lauds, tenements and rents, &c. That indeed was a case of a new river, but still the resolution of Lord Coke, and the two judges to whom the decree of the commissioners of sewers was referred, must be considered as authority.

In *Moore* (b), at a meeting of a board of the privy council, a full report upon the authority of the commissioners of sewers was made by Lord Chief Justice Popham, "that they cannot lay a tax or rate upon any hundreds, towns, or the inhabitants thereof in general, but upon the first presentment and judgment to charge every man in particular, according to the quantity of his land or common."

The same rule was laid down in *Hetley v. Boyer* (c). So also in the case of *The Inhabitants of Outwell* (d).

(a) 10 Rep. 143.

(c) Cro. Jac. 336.

(b) P. 824; *vide post*, p. 456.

(d) Style, 185.

Several other cases will be found collected in *Viner's* Abr. tit. Sewers, and *Comyn's* Dig. tit. Sewers, and reference is made to several cases in *Fraser's* edition of *Coke's* Reports, in the *Case of the Isle of Ely* (a).

Callis, however, in page 121, and the following pages, says, "that a rate or assessment may be made on a town generally, and that the persons who are liable may afterwards apportion it among themselves." Though he also says (in another place) that the commissioners may, in the first instance, assess the particular individuals, and he cites a number of instances to prove his proposition. The cases he cites appear to be amercements on towns or other districts, but which are not circumstanced as assessments made by commissioners of sewers, where their duty is prescribed by the commission itself. *Comyn*, indeed, in his Digest (b), says, that an assessment may be charged in general upon each town, who may afterwards apportion it among themselves, but the only authority he cites for that is *Callis*. And *Comyn* afterwards says, that an assessment upon a town in general, if it be not afterwards apportioned, is not good. And it does not appear that there is any other direct authority for the validity of the assessment upon an entire township, but what is derived from *Callis*. And we think that the other several authorities outweigh his.

The *Case of the Level of Hull* (c) was cited in support of the assessment, but that appears to be an assessment of 9d. an acre on 1312 acres, and we therefore may suppose that the commissioners had considered what lands were liable, and the question there appears to have been, whether it should have been upon the occupiers: but suppose it did support *Callis*, it would not, in our opinion, be a sufficient answer to the other authorities.

It has been said that this is the course which has been pursued ever since the year 1725. That may be, and per-

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(a) 10 Rep. 141 a.

(c) 2 Str. 1127.

(b) Title Sewers, (E 2).

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haps it may upon the whole have been found more convenient to let the landowners settle the proportions among themselves, so as not to trouble the commissioners to fix the proportions, unless there should be a necessity. This course of practice, however, cannot vary the law of the case, and upon the whole we are of opinion that the general assessment cannot be supported, and that there must be

Judgment for the plaintiff.

The following addition to the judgment is made by the desire of the Court.

The COURT inadvertently cited the case from *Moore* in support of their judgment, but though the words in *Moore* are the same as in the present judgment, yet in the case in *Moore* the Court express their disapprobation of those propositions.

But though the case was thus cited inadvertently as an authority in favour of the plaintiff, it makes no difference in the judgment of this Court on the whole case, as they do not concur in the disapprobation in the report in *Moore* (a).

(a) It appears by the report in *Moore*, that the decision of *Coke C. J.*, in *Hetley v. Boyer*, Cro. Jac. 336, as to the illegality of a sewers' rate imposed on a township, now affirmed by the above decision, had given rise to several actions against commissioners of sewers, who petitioned the privy council to be released from them, and their lordships, on a report from the attorney-general, setting out an opinion of *Popham*, late

chief justice, maintaining the legality of a general tax, made an order that the persons having commenced such actions, should stand committed until they released their suits against the commissioners. In *Moore*, 826-8, Lord *Bacon C.*, in his speech to *Montague C. J.*, points out the decision of *Coke C. J.*, on this point, (*viz.* in *Hetley v. Boyer*), as one of the chief reasons for his dismissal from the office of chief justice.



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The QUEEN v. The Justices of the West Riding of YORKSHIRE.—In the matter of Dr. THORNTON.

Friday,
November 3d.

IN Michaelmas term, 1836, *Milner* obtained a rule, calling upon the justices of the West Riding of Yorkshire to shew cause why a writ of certiorari should not issue, to remove into this Court a certain recognizance, entered into by *W. B. Thornton* and two sureties, before *J. A. Esq.*, one of the said justices, on the 9th day of April, 1836, for his keeping the peace and being of good behaviour, for the space of two years, from the date thereof; and also a certain record of conviction, made by *J. M.*, *G. W.* and *J. H.*, Esqrs., three of the said justices, on the 11th day of July, 1836, whereby the said *W. B. Thornton* was convicted of an assault on one *William Peaker*, and adjudged to forfeit for the said offence the sum of 5*l.*; and also an order of sessions, made on or about the 20th day of October, 1836, whereby the said recognizance of the said *W. B. Thornton* and his bail was ordered to be estreated.

From the affidavits upon which this rule was obtained, it appeared that in April, 1836, *Dr. Thornton* was bound (along with two sureties) to keep the peace for two years, towards all his majesty's subjects, and particularly towards one *William Stewart*. On the 11th of July, 1836, *Dr. Thornton* was convicted of an assault upon one *William Peaker*, before three justices, at their petty sessions, and paid a fine of 5*l.* with costs. On the 20th of October, 1836, at the general quarter sessions of the peace for the West Riding of Yorkshire, the Court was moved to estreat the recognizance entered into by *Dr. Thornton*, and the affidavits stated that *Dr. Thornton* had been informed and believed, that an order to estreat was made by the Court of Quarter Sessions.


1. Although an order of the Court of Quarter Sessions to estreat a recognizance for a forfeiture out of the sessions, be a nullity, yet a certiorari will be awarded to remove it, in order to quash it.

2. The Court of Quarter Sessions has no authority to order a recognizance to keep the peace to be estreated, where the alleged forfeiture of the recognizance has not taken place at the sessions. The proper course in such a case is to remove the recognizance into one of the superior courts, and proceed by *scire facias*.

3. Since the 3 *Geo. 4*, c. 46, the Court of Exchequer has no jurisdiction over recognizances forfeited either be-

fore justices out of sessions or at the sessions.

4. It is the duty of the clerk of the peace to put the law in motion to levy all recognizances forfeited at quarter sessions.

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Sir *J. Campbell* A. G. and Sir *G. A. Lewin*, now shewed cause against the rule nisi. It was contended, when this rule was moved for, that the Court of Quarter Sessions had no jurisdiction to order this recognizance to be estreated. Assuming that to be so, the order of the Court of Quarter Sessions was a nullity, and it is therefore unnecessary that it should be moved into this Court to declare it void. The recognizance and the conviction need not be removed, as there is no objection to either of them.

The Court of Quarter Sessions, however, had full power to order the recognizance to be estreated. The 3 *Geo.* 4, c. 46, entirely altered the mode of proceeding with respect to forfeited recognizance. By the second section of that statute it is enacted, that all fines, forfeited recognizances, sum or sums of money, which shall be set, imposed, lost or forfeited, by or before any justice of the peace in England, shall be certified by the clerk of the peace of the county, and the clerk of the peace shall copy on a roll such fines and forfeited recognizances, together with all fines imposed or forfeited at such general or quarter sessions, and shall, within a certain time, send a copy of such roll, with a writ of distringas and capias, or fieri facias and capias, to the sheriff of the county, who is to proceed thereon. It has been doubted whether the Court of Exchequer has now any authority with respect to a recognizance which has been estreated at the quarter sessions; *Ex parte v. Pellow* (a), *The King v. Hankins* (b). But there is no doubt respecting the jurisdiction of the Court of Quarter Sessions itself. In this case a similar course has been followed to that which was adopted in *Haynes v. Hayton* (c). There the Court held that the Court of Quarter Sessions had proceeded rightly and properly. Here, there was merely an order of sessions to estreat. If *Dr. Thornton* supposed himself aggrieved by that order, his proper course was to have appealed, which the 5th and 6th sections of the 3 *Geo.* 4, c. 46, enable him to do.

(a) M'Clel. 111.

(c) 7 B. & C. 293.

(b) 1 M'Clel. & Young, 27.

Cresswell and *Wortley*, in support of the rule. Although the order of the Court of Quarter Sessions is a nullity, yet this Court will permit it to be removed, in order to prevent any further proceedings being taken upon it.

The Court of Quarter Sessions had no jurisdiction to order the recognizance to be estreated. There is a distinction between those cases where the recognizance is forfeited at and out of the sessions. Where a recognizance is entered into to do something at the Court of Quarter Sessions, for example, to appear and prefer an indictment, then, if the party does not appear, the recognizance may be estreated, and this is all that is established by *Haynes v. Hayton* (a). But where the recognizance is entered into for the doing of something out of the Court of Quarter Sessions, as keeping the peace or being of good behaviour, then the Court of Quarter Sessions has no authority to estreat the recognizance. The proper course in the latter case is to issue a scire facias; *The King v. Cossins* (b), *The King v. Heyward* (c), *Hutchins v. Periam* (d), *Perrowe's* case (e), *Bacon's Abr.* (f); and the reason is, that the party bound, and his sureties, may have an opportunity of pleading either that there has been no forfeiture in fact of the recognizance, or that there has been a release.

The 3 *Geo.* 4, c. 46, only applies to recognizances which are forfeited at the sessions, and does not affect the mode of proceeding by scire facias.

But this recognizance could not be enforced in consequence of the 9 *Geo.* 4, c. 31. The 27th and 28th sections of that statute enact, that in case a party shall be summarily convicted for an assault, and shall pay the penalty imposed upon him, he shall be released from all further or other proceedings, civil or criminal, for the same cause. This is in truth a civil proceeding in the same case.

(a) 7 B. & C. 293.

(b) *Parker's Rep.* 54.

(c) *Cro. Car.* 498.

(d) 3 *Bulst.* 220.

(e) 1 *Rolle's Abr.* title Execution, (O), pl. 4, p. 900.

(f) 7 *Bac. Abr.* 513, title Surety of the Peace, (H), 7th edit.; and title Scire Facias, (C 2).

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It was necessary to remove the recognizance and conviction, in order that this Court might see upon what the Court of Quarter Sessions proceeded.

Cur. adv. vult.

Lord DENMAN C. J., on a subsequent day in this term, delivered the judgment of the Court, as follows:—

This was an application for a certiorari to remove certain proceedings from the Court of Quarter Sessions for the West Riding of the county of York, and particularly a certain order of the said Court, estreating a recognizance entered into by the applicant, *Dr. Thornton*, to keep the peace.

The facts of the case, as detailed by the affidavits, are shortly these:—*Dr. Thornton* entered into the said recognizance before a single justice of the West Riding, in the month of April last. On the 11th day of July following he was convicted of an assault before three justices, at their petty sessions, and paid a fine of 5*l.* with costs. At the quarter sessions holden at Leeds, in the month of October following, an application was made to the Court to estreat the said recognizance, upon proof of the conviction, a record of which was duly returned, and of the identity of the said applicant, and the same was estreated accordingly. That this was the fact, we think, must be assumed from the affidavits, because the applicant swears that he has been informed and believes that an order to estreat was made, and the affidavit to shew cause, though it alleges that the motion was opposed by counsel, does not deny that an order was made.

We have been for some time in doubt whether the nature and quality of the act done by the sessions did sufficiently appear; it having been contended, in opposition to the application, that the order of sessions was at least inoperative and harmless, whether legal or not.

We think, however, upon further consideration, that what has been done is a grievance to the party applying.

It appears by the 3 *Geo.* 4, c. 46, (much adverted to in the argument,) s. 1, that the 22 & 23 *Car.* 2, c. 22, which directed the return of estreated recognizances into the Exchequer, is repealed, and a new and more compendious mode of recovering the sums forfeited is by the first-mentioned act substituted. And accordingly, by the second section, the clerk of the peace is directed to copy in a roll, a list (*inter alia*) of all forfeited recognizances, both before justices singly or at petty sessions, *and at the quarter sessions*, which roll he is directed to forward to the sheriff, with a form of process prescribed by the act, who is thereupon to levy the same. And by the 8th section, the sheriff is to make a return of what he has done to the quarter sessions, and the clerk of the peace is to certify, in the manner therein prescribed, *to the Lords of the Treasury*. By the repeal therefore before mentioned, and this substitution, it seems that the Court of Exchequer no longer retains any jurisdiction over the two sorts of forfeited recognizances, namely, those before justices out of sessions, and those at the quarter sessions. And this is the view of the subject which that Court (Exchequer) has taken expressly in the case of *Rex v. Hankins* (a), upon a consideration and review of the different clauses of the act now brought under our notice. If therefore it be imperative upon the clerk of the peace (as it seems to us it is) to put the law in motion, to levy the amount of *all* recognizances forfeited *at the sessions*, it follows, we think, that the party applying for the certiorari is aggrieved necessarily, if the Court had no power legally to make the order.

We come now to the question of jurisdiction. It certainly would seem to be extraordinary, if this recognizance was duly estreated upon formal proof before the sessions, of a proceeding had elsewhere, in which the recognizance neither had, nor by possibility could at all come into question. And we think that the power to make this order should be

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(a) 1 M'Clel. & Young, 27.

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shewn affirmatively, as in ordinary cases the jurisdiction of the sessions over the cases coming before them may without difficulty. We are referred, however, merely to the statute, which we have already noticed, 3 *Geo.* 4, c. 46, the latter act of 4 *Geo.* 4, c. 37, amending only some provisions not material to the present purpose. We think that the first-mentioned act has an intelligible and ample operation, if we consider it as directed to the more speedy levying of sums due upon (inter alia) forfeited or lost recognizances, without at all interfering with the method or authority by which those recognizances may legally be put into execution. A sufficient effect is attributed to this act, if we consider it to be applicable to recognizances lost or forfeited before justices out of sessions, and also at the Court of Quarter Sessions itself, for matters immediately connected with its own proceedings. Nor do we think that the provision in the 5th section, whereby the sessions are enabled to give relief to persons upon whom a levy has been made in two certain cases, (and two only,) affords any argument in favour of their jurisdiction to estreat their recognizance. The question of *how* the recognizance may be legally forfeited, seems to remain untouched. The case of *Haynes v. Hayton* (a), cited, and a good deal relied upon, only proves, that although the sessions have the power of granting relief to a party upon whom a levy is made, when he goes to prison or gives security to appear at the sessions, they have no such power where he pays the money at once, in order to get out of trouble. This decision is obviously wholly beside the point now under consideration, which is, whether the Court of Quarter Sessions had any authority to set the law in motion by estreating the recognizance upon which the levy follows.

Nor is the argument in favour of the jurisdiction of the sessions advanced, by attending to the state of the law generally upon this subject. No rule is more invariable than

(a) 7 B. & C. 293.

that a person shall not be prejudiced in any manner without being heard. The affidavit of the applicant gives a favourable turn to the transaction which led to his conviction, but without placing reliance upon that, it is certain that the conviction may have been wrong; possibly, indeed, though bearing the same name, he may not be the same person, he may therefore have had cause to shew against the forfeiture of his recognizance, which he has had no opportunity of doing.

We were referred to the authorities collected in *Bacon's Abridgment*, under the title "Scire Facias, (C 2)," and we shall advert to one of them: "If a man be bound in a recognizance to the king, to be of good behaviour &c., he cannot be indicted for breach of the good behaviour, by which he forfeits his recognizance, without a scire facias." And a weighty reason is given:—"For if a scire facias had been brought, he might have pleaded some matter in discharge thereof (a)." And in the case of *The King v. Hutchings*(b), which is there referred to, which was a recognizance for good behaviour, taken in the Crown Office, it appears that a writ of sci. fa. was brought. And upon inquiry we find that the course of proceeding in the Crown Office is uniformly in conformity hereto.

Upon the whole, we think that sufficient appears to induce us to say, that the writ of certiorari shall go.

Rule absolute.

(a) 7 Bac. Abr. 135, 7th ed.

(b) Cro. Jac. 412; S. C. 3 Bulstr. 222.

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Monday,
November 20th.

The QUEEN v. BLISS, Esq.

Indictment for obstructing a highway. Plea, not guilty. A witness stated, that about forty years ago a deceased occupier of land over which the road passed, planted a willow near the road. The witness was then asked what the occupier said when he planted the willow. The witness answered that the occupier said that he planted the willow to shew where the boundary of the road was when he was a boy. It was held, that the statement of the occupier was not receivable in evidence, on the ground that it was evidence of reputation, or as a declaration accompanying an act done, or as a declaration against the interest of the party making it.

THIS was an indictment against the defendant for obstructing a highway in the parish of Brandon, in the county of Suffolk, by building a wall across it. Plea, not guilty. At the trial before *Gaselee J.*, at the Suffolk spring assizes in 1836, the jury found a verdict of guilty. The contention at the trial was, whether the road which ran from the side of the river to the town of Brandon was public or private. A witness was called, who stated, that about forty years ago, one *Rampling*, who was dead, was the occupier of certain meadows near the river, over which the road passed, and that he saw *Rampling* plant a willow near the road. The witness was then asked what *Rampling* said when he planted the willow. To this question the witness answered, that *Rampling* said he planted the willow to shew where the boundary of the road was when he was a boy. This evidence was objected to as inadmissible, but it was received by the learned judge. In Easter term, 1836, *Storks Serjt.* obtained a rule nisi for a new trial, on the ground that the above evidence had been improperly received. Against which

Biggs Andrews, and *Byles*, now shewed cause. The declaration by *Rampling* was admissible as evidence of reputation. It was evidence by reputation of the existence of the highway, and of the extent of it. It was hearsay evidence of the extent of the road. [*Coleridge J.* The usual mode is to prove, by direct evidence, the direction of the road, and then to prove by reputation that the road is public. How does it appear that *Rampling* meant that the road was public?] It was for the jury to determine what was the meaning of the conversation. [*Coleridge J.* The admissibility of evidence cannot depend upon the meaning which the jury may give to the answer of the witness.]

Secondly. The evidence was admissible as a declaration accompanying an act done. The fact of the planting of the willow by the tenant of the land was clearly admissible in evidence, and what he said at that time explanatory of his motive for planting the willow is surely receivable in evidence.

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The evidence was admissible as a declaration against the interest of the party who made it. *Rampling* was the tenant of the land, and it was clearly his interest that there should be no right of way over the land which he occupied. The declaration of *Rampling* amounted to this, that his right of cultivating the land extended only as far as the willow tree. The acts and declarations of tenants have always been considered admissible, on the ground that the interest of the tenant is the same as the reversioner. It is said by *Le Blanc J.*, in *Daniel v. North(a)*, that the exception to that rule is, where the question is as to a right to lights. *Le Blanc J.*, in giving judgment in *Daniel v. North(a)*, says, "It is true that presumptions are sometimes made against the owners of land during the possession, and by the acquiescence of their tenants, as in the instances alluded to, of rights of way and common, but that happens because the tenant suffers an immediate and palpable injury to his own possession, and therefore is presumed to be upon the alert to guard the rights of his landlord as well as his own, and to make common cause with him; but the same cannot be said of lights put out by the neighbours of the tenant, in which he may probably take no concern, as he may have no immediate interest at stake."

Third point :
The declaration is admissible as a declaration against the interest of the party making it.

Kelly, who was to have argued in support of the rule, was stopped by the Court.

Lord DENMAN C. J.—The question at the trial was, whether this road was public or private. A witness was called, whose statement was likely to make a great impres-

(a) 11 East, 372.

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sion on the jury. He stated that *Rampling*, a former tenant, said that he planted a willow to shew where the boundary of the road was when he was a boy. From what he said it was wished that the jury should infer this was a public road. The statement by *Rampling* was not, in my opinion, receivable in evidence, on the ground that it was a declaration accompanying an act, or as a declaration contrary to the interest of the party making it, or as evidence of reputation.

Second point.

Every word accompanying an act is not receivable in evidence. The fact of the willow being planted, and that it was planted by a particular man, was receivable in evidence. But the motive which induced that individual to plant the willow was clearly not admissible. The statement that it was planted with a particular object is irrelevant to the issue, nor is the fact of planting the willow relevant, except as accompanied by the circumstance that the public have since kept within the line marked out by it.

Third point.

Then was the statement receivable as a declaration against the interest of the individual making it? If we were to hold that it was receivable in evidence on that ground, we should overrule the decision in *Daniel v. North (a)*. In that case the tenant had suffered an inconvenience for a very considerable length of time; yet it was held that the landlord was not concluded by the acquiescence of the tenant. In some cases the interest of the landlord and the interest of the tenant may be the same. But in many cases the tenant may have an interest directly opposed to that of the landlord.

Is it then evidence of reputation? every thing which depends upon hearsay should be received with great caution. Hearsay evidence, in matters of this sort, was received by Lord *Ellenborough* in the first case with great reluctance. It is only to be received as shewing general reputation, and not as evidence of particular facts. Here the hearsay evidence relates to a particular fact, and therefore is inadmis-

sible. The statement did not describe the road as public or private.

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PATTERSON J.—I am entirely of the same opinion. To determine whether it was receivable as evidence of reputation, it is necessary to see what was the issue. It was whether this was or was not a public road. If the issue had been as to the boundary of a public road it might have been receivable in evidence, but evidence of reputation as to boundary cannot be given in evidence where the question is whether the road is public or private. If the witness had said this always was a public road as far as this place, it would have been receivable. The statement is clearly not receivable as evidence of reputation. I agree also with my Lord, that evidence of reputation is only receivable as to general matters, and not as to particular facts, and that this evidence relates to a particular fact. Then was the statement receivable in evidence as a declaration accompanying an act done. It is very equivocal whether it was explanatory of the act done. But assuming it to be so, that act does not shew that the road was public or private, but only what the boundary was. The mere fact of a tree being in a particular place would not be relevant to the issue except as introductory of other matter. Then was it receivable as a declaration against interest? The person who made the statement was only the occupier of the land; and the declaration of an occupier cannot prejudice the landlord. Were we to decide otherwise we should overturn *Daniel v. North* (a) and *Wood v. Veal* (b). In the latter case it was held, that a long acquiescence by a tenant cannot bind a landlord, and if so, how can his mere declaration? On all these grounds I am of opinion the evidence was not receivable on this particular issue.

WILLIAMS J.—The main question here is, whether the de-

(a) 11 East, 372.

(b) 1 D. & R. 20; 5 B. & Ald. 554.

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claration was receivable as evidence by reputation that the road was public. In *Ireland v. Powel* (a) this distinction is laid down by Mr. Justice *Chambre*, that hearsay evidence of a particular fact is not admissible, but only of general reputation. The declaration in this case related to a particular fact, and was not, therefore, admissible. Declarations accompanying an act which tend to explain it are receivable in evidence. But in this case the declaration had no connection with the act done. Would any other statement about some other matter have been receivable in evidence if made when the act was done? As to its being against the interest of the party making the declaration, he was only the occupier, and his declaration could not prejudice his landlord.

COLERIDGE J.—I only wish to add one word as to whether this declaration was receivable as evidence of reputation. No rule is more universal than that statements admissible in evidence on the ground that they are evidence of reputation, must relate to general matters and not to particular facts. To determine whether the statement in this case was evidence, we must sever the conversation from the act. The question is, what did *Rampling* say about the planting of the tree. The answer is, *Rampling* said he planted it for the purpose of pointing out the boundary. Suppose the question had been, have you heard old persons say why a particular stone or post was put down? I apprehend the answer to that question would not be receivable. Here the question in substance is, do you know why the willow tree was planted? The question has reference to a particular transaction, and was therefore improper.

Rule absolute.

(a) *Peake's Evid.* 14.



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TRESPASS. The declaration complained that the defendants broke and entered the dwelling-house of the plaintiff, situate in the parish of St. Bride, London. Plea, that the dwelling-house was immemorially parcel of the parish of St. Bridget, otherwise St. Bride, in the city of London, and that there was an immemorial custom for all and every of the parishioners, for the time being, of the parish of St. Bridget, otherwise St. Bride, to go through the dwelling-house upon their perambulations of the boundaries of the parish of St. Bridget, otherwise St. Bride, upon Thursday in Rogation week, in every third year; and that immemorially the parishioners for the time being of the parish of St. Bridget, otherwise St. Bride, have used and been accustomed, in the exercise of the custom aforesaid, to go through the dwelling-house upon their perambulation of the boundaries of the parish of St. Bridget, otherwise St. Bride, upon Thursday in Rogation week, in every third year; wherefore the defendants, being then and there two of the parishioners of the parish of St. Bridget, otherwise St. Bride, on the Thursday in Rogation week, in the year 1833, being then and there a third year, in the exercise of the custom aforesaid, went through the dwelling-house upon the perambulation by the parishioners of the said parish of St. Bridget, otherwise St. Bride, of the boundaries of the same parish, using the said custom there for the purpose and on the occasion aforesaid.

A custom for the parishioners, on perambulation of the parish boundaries, to go through a house which is not on the boundary line, is bad.

The replication traversed the custom, upon which issue was joined.

At the trial in London, before Lord Denman C. J., at the sittings after Michaelmas term, in 1835, the custom, which was set out in the plea, was proved, and a verdict passed for the defendants. It appeared, however, that the dwelling-house of the plaintiff was not upon the boundary line, but that the boundary line crossed adjoining premises

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belonging to Messrs. *Sandys*. In Hilary term, 1836, *Cresswell* applied for a rule nisi for a new trial, or judgment non obstante veredicto, on the ground either that the plea must be understood as alleging that the plaintiff's house stood upon the boundary line, and in that case it was not proved, or it must be understood as stating a custom for the inhabitants of a parish to pass through a house not on the boundary line; and then the plea was bad, because the custom was unreasonable. He also stated, that in the course of his address to the jury he had said that the defendants had given no evidence of the contents of the parochial books on the subject, nor any evidence of reputation, and that the lord chief justice, in summing up, told the jury such evidence would have been inadmissible. The Court granted a rule nisi, against which, in Trinity term last,

Sir *J. Campbell A.G., Barstow and White*, shewed cause (a). First, as to entering judgment non obstante veredicto. The custom, as alleged in the plea, is good. In *Goodday v. Michell* (b) it was held, that a custom for the parishioners to go over the plaintiff's close upon their perambulation in Rogation week, was good. In *Viner's Abr.* (c) the same custom is recognized as good. There can be no distinction between going through a dwelling-house and entering upon land. It is said that the custom is bad, because the house is not upon the boundary line. The object of the perambulation is to keep up a recollection of the boundary: that may be done as well by proceeding on a line a certain distance from the boundary as by passing along the boundary line itself. It may be that it is impossible for all the persons making the perambulation to go upon the boundary line; some deviation must necessarily be lawful. It is probable that the deviation from the boundary line was made under some arrangement in very early times, the memory of

(a) This case was argued on Tuesday, the 30th May, 1837, before Lord Denman C.J., *Littledale*,

Patteson, and *Williams Js.*

(b) Cro. Eliz. 441; S.C. Owen, 71.

(c) Tit. "Perambulation," 5.

which is lost. This plea is similar to one in *Coke's Entries* (a). In *Pain v. Patrick* (b) it is said that the inhabitants of a vill may allege a prescription to have a right of way to a market. In *Fitch v. Rawling* (c) it was held, that a custom for all the inhabitants of a certain parish to play at all sorts of lawful games and pastimes in the close of A., at all seasonable times of the year, at their free will and pleasure, was good.

As to the motion for a new trial, the plea does not state that the plaintiff's house was on the boundary line, and therefore it was not necessary to prove that it was.

Cresswell and *W. H. Watson*, in support of the rule. As to the judgment non obstante veredicto, the only case which has been cited in support of the validity of the custom, is that of *Goodday v. Michell* (d). It is to be remarked that the judgment in that case was given against the plea pleaded. This is a custom to enter a man's dwelling-house, which is, *primâ facie*, unreasonable. Supposing that the custom had been pleaded without such occasion for it as is stated in the plea: in that case it would be simply a custom for all the parishioners to go through the plaintiff's house on a particular day: which would clearly be unreasonable. Does the occasion mentioned in the plea render it reasonable? It is alleged to be for the purpose, and on the occasion of perambulating the parish boundary. But can it be said to be necessary, for such a purpose, that the parishioners should go through a house which is not upon the boundary? Besides, the plea does not claim a right in the parishioners to go through the plaintiff's house to ascertain the boundary, but to go through upon their perambulation. Any custom to enter upon the land of another is void, unless the existence of the custom is necessary for the public benefit. Thus, a custom for fishermen to dry their nets upon the land of another person, which joins the sea, is good.

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(a) P. 651, 652.

(c) 2 H. Bla. 393.

(b) 3 Mod. 289, 294.

(d) Cro. Eliz. 441; S.C. Owen, 71.

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But an alleged custom for fishermen to drive stakes in the ground of another, for the purpose of drying their nets, was held to be bad, because it was unnecessary (a). It is not every custom for parishioners to do something on a particular day which is good: for in *Reynold's* case (b) it was held that a custom to find meat and drink for the parson of the church and others making the procession in Rogation week, was bad. In *Fitch v. Rawling* (c) the custom was for the public benefit.

On a question of boundary, reputation would be evidence, although evidence, by reputation, of a particular fact, would be inadmissible.

Cur. adv. vult.

Lord DENMAN C. J. in the course of this term delivered the judgment of the Court as follows:—

In the course of trying the existence of a custom for all the parishioners of St. Bride's, on their annual perambulation of the parish bounds, to go through the plaintiff's house, though not in the line of the parish boundary, the plaintiff's counsel observed to the jury, that the defendant had given no evidence of the contents of parochial books on the subject, nor any evidence of reputation. In summing up, I observed on this statement, and am supposed to have said, that such evidence would have been inadmissible. A rule nisi has been obtained, on the ground that herein I misdirected the jury, because the existence of a public right of this nature may be proved by reputation.

We agree that if a judge misleads a jury on any question of law, the losing party is entitled to a new trial, for the jury must be supposed to adopt the law as expounded to them, and their verdict may have proceeded on the erroneous direction: nor can any calculation be permitted of the extent to which the error may have operated.

But I am by no means clear that the observation was

(a) Brooke's Abr. tit. "Customs," pl. 46.

(b) Moore, 916.

(c) 2 H. Bla. 393.

made in the manner supposed. My attention was not called to it at the time of the summing up, and I took no note of what I said in that particular. On the contrary, recalling what passed as accurately as I now can, I am rather inclined to believe that the evidence which I thought would have been inadmissible, was that of entries in parish books, recording the fact that the perambulations had taken a particular line. We all think that this would have been correct; and even a careful reporter might have confounded this opinion with that which was justly considered erroneous.


On this ground therefore no sufficient case for granting a new trial is made out. But the learned counsel for the plaintiff moved to enter judgment for him, notwithstanding the plea found for the defendant, arguing, that a custom to pass through a particular house within a parish, upon the perambulation of the boundaries, is bad in law, unless such house is upon the boundary line, so that the perambulation cannot be made without passing through the house.

The plea indeed stated that the defendants went through the plaintiff's house upon the perambulation of the boundaries, using the said custom there; which expressions might import that the house was in the boundary line. If this construction was admissible, the plaintiff would be entitled to a new trial, and ultimately to a verdict, because the plea so understood was disproved. But the construction cannot be adopted; the plea only averring the house to be within the parish, and the custom to be, that it is lawful for all and every the parishioners to go through it upon their perambulation of the boundaries. The question therefore is, whether the custom so laid is valid in law.

The right to perambulate parochial boundaries, to enter private property for that purpose, and to remove obstructions that might prevent this from being done, cannot be disputed. It prevails as a notorious custom in all parts of England, is recorded by all our text writers, and has been confirmed by high judicial sanction. Lord C. J. *Anderson*, and the whole Court of Common Pleas, assert the custom and the right in the most unqualified manner, in *Goodday*

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v. *Michell* (a); the pleadings in which are to be found in *Coke's Entries*, 651 b. That case indeed appears to be the only decision in the books on the subject of parish perambulations. There the justification failed; but the defect was in the mode of pleading, for the defendant's right was thought to be placed on prescription, and not on custom; and besides, the bar did not embrace all the trespasses laid in the declaration. These material faults being pointed out and adjudged fatal, superseded the necessity for examining the plea more minutely, and inquiring whether the custom was well laid.

It claims a prescriptive right to enter plaintiff's close exactly in the same manner as the defendants in this action justify under the custom for all and every the parishioners, upon the perambulation of the boundaries, to enter plaintiff's house, which is averred to be within the parish. Now it is obvious that the right to perambulate boundaries cannot confer a right to enter any house in the parish, however remote from the boundaries, and though not required to be entered for any purpose connected with the perambulation; and it seems to follow that a custom on that occasion to enter a particular house, which is neither upon the boundary line, nor in any manner wanted in the course of the perambulation, cannot be supported.

On principle, therefore, the custom laid is bad in law; and the authority of the case, as to the form of pleading, cannot go for much, as the plea was set aside for two fatal faults in other respects. The report contains several references to the Year Books, and one to *Fitzherbert's Natura Brevium*; none of which have any bearing on this objection. The Book of Entries (p. 158) is also quoted, but neither in that page, nor in any other, is light thrown upon it.

For the reasons given we think ourselves bound to give our judgment for the plaintiff.

Rule absolute to enter judgment for
 the plaintiff *non obstante veredicto*.

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FROST v. WILLIAMS and another.

TRESPASS for seizing and impounding a cabriolet and horse of the plaintiff. Plea, not guilty. At the trial before *Williams J.*, at the sittings in Middlesex, in Easter term, 1836, a verdict was found for the plaintiff, with 10s. damages, subject to the opinion of the Court on a case. The following facts were admitted. That the plaintiff was the licensed proprietor of a cabriolet and horse, for the seizing of which the action was brought, and that plaintiff was duly attending the same. That they were standing for hire in a part of Oxford Street which had usually, and for many years previously, been a stand for hackney carriages. That the commissioners of stamps had licensed a waterman to the stand in question, and that such licence was then in force, and the waterman thereby licensed then duly attending such stand. That while the said cabriolet and horse were so standing for hire, they were seized and taken away by the defendants, and impounded for seven days. That the stand in question was in the parish of St. Marylebone, and in a place prohibited by the rules and regulations for the standing of hackney coaches in Oxford Street, as set forth and ordered by the vestry of St. Marylebone. That

1. A power given by a local act to the vestrymen of a parish, to "direct and regulate such stands for hackney coaches and chairs as they, in their discretion, shall think fit" within its limits, is not superseded by the provisions of 1 & 2 Will. 4, c. 22, (commonly called the Hackney Coach Act,) although such stands be within the distance of five miles from the General Post Office.

2. The 35 Geo. 3, c. lxxiii (local), empowers the


vestrymen of the parish of St. Marylebone to direct and regulate stands for hackney coaches within that parish. The 57 Geo. 3, c. xxix. s. 65, (commonly called the Street Act, or Michael Angelo Taylor's Act,) enacts, that "if any person shall set out, lay or place any coach, cart, wain, waggon, dray, wheelbarrow, handbarrow, sledge, truck, or other carriage, upon any carriage way, (except such coaches and chairs as shall be hereafter licensed by the commissioners for regulating and licensing hackney coaches, chariots and chairs, and which stood for hire according to the statutes and bye-laws made for those purposes,) it shall be lawful for persons appointed by the commissioners, or trustees or other persons having the control of the pavements in any parochial or other districts, without any warrant or other authority than this act, to seize such coach, &c." By sect. 137 it is declared that the powers conferred by this act on commissioners and trustees extend to vestrymen and others having the control of the pavements. Plaintiff was the licensed proprietor of a cabriolet and horse, which were standing for hire at a stand prohibited by the rules and regulations for the standing of hackney coaches in Oxford Street, set forth and ordered by the vestrymen of St. Marylebone, who have the control of the pavements in that parish. The defendants, acting under the employment of the vestrymen, seized the cabriolet and horse:—Held, that by virtue of the provisions of these acts they were justified in so doing.

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previous to the seizure notice was duly given to the plaintiff to remove his cab and horse, according to 57 Geo. 3, c. xxix, (local, commonly called Michael Angelo Taylor's Act,) s. 65. That the vestrymen of St. Marylebone have the control of the pavements in that parish; that the defendants were in their employ. That the cabriolet and horse were not standing during the necessary time of taking up or setting down any fare, or waiting for passengers by whom they had been actually hired, or for the purpose of harnessing or unharnessing the same from the said cabriolet. The defendants pleaded the general issue under the local act.

The case proceeded as follows. That by the 35 Geo. 3, c. lxxiii. (local), certain vestrymen are appointed for the management of divers matters in the parish of St. Marylebone, and amongst other things for paving, repairing, cleansing, and lighting the said parish; and by sect. 95 of that act it is enacted as follows:—"And whereas both hackney coachmen and hackney chairmen frequently take their stands with their coaches and chairs in such parts of a square or street as to cause great obstructions both on the carriage and foot way, be it therefore enacted, that from and after the 5th day of June (1795), the said vestrymen may direct and regulate such stands as they shall, in their discretion, think proper, within the limits aforesaid; and if any hackney chairman or hackney coachman shall not comply with such regulations, he or they shall forfeit and pay the sum of ten shillings for every such offence." That in pursuance of the above enactment, the vestry, on the 29th August, 1835, duly made certain regulations respecting hackney coach stands within their jurisdiction, by which regulations, amongst other things, they directed that no hackney coaches should be allowed to stand for hire in certain parts of Oxford Street therein specified. The defendants contend, that the vestry having made the foregoing regulations, and the plaintiff having, after the making thereof, placed his cab and horse in a part of Oxford Street

contrary thereto, they were justified in seizing the same by virtue of the local act, 35 *Geo. 3*, c. lxxiii., and the Street Act, 57 *Geo. 3*, c. xxix. s. 65. The plaintiff contends that the acts in question did not give the defendants any such authority: That 35 *Geo. 3*, c. lxxiii. s. 95, duly authorized the plaintiff being summoned and fined ten shillings, if that section is not in effect repealed: That 57 *Geo. 3*, c. xxix. s. 65, excepts hackney coaches from the operation of that act: That the General Hackney Coach Act, 1 & 2 *Will. 4*, c. 22, gives a right for hackney coaches and cabriolets to stand in any part of the public highway in the county of Middlesex: That 35 *Geo. 3*, c. lxxiii. s. 95, is virtually repealed by the General Hackney Coach Act, and that therefore the right to make the regulation ceased on the passing of that act; and that the local act does not apply to cabriolets. The question therefore for the opinion of the Court is, whether, under the acts in question, the defendants had the right to seize the plaintiff's cabriolet and horse. If the Court should be of opinion that the defendants had not the right contended for by them, the verdict to stand: if otherwise, then a verdict to be entered for defendants (a).

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(a) The following are the statutes referred to in this case:

35 *Geo. 3*, c. lxxiii. (local act,) whereby certain vestrymen are appointed for the management of divers matters in the parish of St. Marylebone, in the county of Middlesex; and amongst other things, for paving, cleansing, repairing, and lighting the said parish.

Sect. 95. See the case, p. 476.

55 *Geo. 3*, c. 159 (public act).

Sect. 4. That it shall be lawful for the commissioners for licensing and regulating hackney coaches, by and with the approbation and direction in writing of the Lords

Commissioners of his Majesty's Treasury, or any three or more of them, and they are hereby authorized and empowered, under their hands and seals, to licence such number of carriages *with two wheels, and drawn by one horse*, as shall be specified in any such approbation or direction as aforesaid, and the owners and drivers of such two-wheeled carriages shall be chargeable and charged with the like sum for licences as are now payable for licences for hackney coaches, and shall be entitled to demand, take, and receive two-thirds of the fares established by law for hackney coaches and cha-

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The case was argued in Trinity term (a), by

Sir J. Campbell A.G., for the plaintiff. The defendants rely on the local act, which gives the vestry of St. Marylebone certain powers with respect to hackney coach stands

(a) Friday, June 6th, before Lord Denman C.J., Littledale, Patteson and Williams, Js.


riots: and no owner or driver of any such two-wheeled carriage shall be compellable to carry more than two persons; and all orders, rules, regulations, bye-laws, penalties, forfeitures, clauses, provisions, matters and things, contained in any act of parliament relating to hackney coaches or chariots, in the cities of London and Westminster, shall extend and apply to, and be put in force, in relation to all such licensed carriages, and the owners and drivers thereof, and to all persons using the same.

57 Geo. 3, c. xxix. (local act, commonly called the Street Act, or Michael Angelo Taylor's Act).

Sect. 65. That if any person or persons at any time hereafter shall . . . set out, lay, or place, or cause or procure, permit or suffer to be set out, laid, or placed, any coach, cart, wain, waggon, dray, wheelbarrow, hand-barrow, sledge, truck, or other carriage, upon any of the said carriage ways (except such coaches, chariots, and chairs, as have been or shall be hereafter licensed by the commissioners for regulating and licensing hackney coaches, chariots and chairs, and which stand for hire, according to the statutes and bye-laws made for those purposes), and also except

for the necessary time of loading or unloading any cart, wain, waggon, dray, sledge, truck, or other carriage, and taking up or setting down any fare, or waiting for passengers when actually hired, or harnessing or unharnessing the horses, &c. . . and shall not immediately remove all or any such matters or things, being thereunto required by any surveyor or surveyors of pavements, or by any other person or persons employed or appointed by the commissioners, trustees, or other persons, having the control of the pavements in any parochial or other districts . . . then and in every such case it shall and may be lawful to and for any justice of the peace for the city, borough, or county, wherein the said parochial or other district may be situate, and he is hereby required, upon complaint made to him by any one or more credible witness or witnesses upon oath, to issue a summons, requiring the person or persons accused of such offence, or the owner or owners of the coaches, &c. which shall be so set out or placed, exposed or set out, or the master or masters of the person or persons by whose servants, or by the person or persons employed, by whom such offence shall have been committed,

within the parish. In the first place, that act does not apply to cabriolets. Cabriolets were first licensed by 55 *Geo. 3*, c. 159. They are therefore within the term "hackney carriages" in the Street Act, 57 *Geo. 3*, c. xxix.; but not in the Marylebone local act. Next, it gives no power to seize, but directs a specific mode of proceeding. They cannot therefore justify, unless they can bring themselves

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to appear before him, or before any other justice of the peace, &c. . . . and if the person or persons so offending shall be convicted of any or either of the offences aforesaid . . . he, she or they, who shall be so convicted, and the owner or owners &c., and the master or masters, employer or employers of the person or persons so offending, shall forfeit and pay for the first offence the sum of 40s., and for the second and every subsequent offence, any sum not exceeding 5l. . . . And also that not only shall such penalties become payable and to be recovered, but that it shall and may be lawful to and for any person or persons appointed or to be appointed by the said commissioners or trustees, or other persons as aforesaid, for that purpose, without any warrant or other authority than this act, to seize any such coach, &c. . . . and the same shall be kept and detained until such owner, &c. shall cause to be paid the said penalty, together with the charges for taking and removing the same.

Sect. 137 provides that the powers conferred on commissioners and trustees, shall belong to vestrymen, committees, courts, and all other persons having the control of the pavements.

1 & 2 *Will. 4*, c. 22 (commonly called the Hackney Coach Act).

Sect. 4. And be it enacted, that every carriage with two or more wheels, which shall be used for the purpose of standing or plying for hire in any public street or road, at any place within the distance of five miles from the General Post Office, in the city of London, whatever may be the form or construction of such carriage, or the number of persons which the same shall be calculated to convey, or the number of persons which the same shall be drawn, shall be deemed and taken to be a hackney carriage within the meaning of this act; and in all proceedings at law or otherwise, and upon all occasions whatsoever, it shall be sufficient to describe any such carriage as aforesaid by the term "hackney carriage," without further or otherwise describing the same: Provided always, that nothing in this act contained shall extend to any stage coach used for the purpose of standing or plying for passengers, to be carried for hire at separate fares, and being duly licensed by the commissioners of stamps for the purpose, and having thereon the proper numbered plates required by law to be placed on such stage coaches.

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within Michael Angelo Taylor's Act, 57 *Geo.* 3, c. xxix. ss. 65 and 137. The words of that act are undoubtedly larger, and include carriages. But sect. 65 applies only to cases where coaches or carriages are standing contrary to

Sect. 7. And be it enacted, that any two of the commissioners of stamps, or any person duly authorized by the said commissioners, shall grant licences under their or his hands or hand, upon the terms and conditions and in the manner hereinafter mentioned, to keep, use, employ and let to hire any hackney carriage *at any place* within the distance of five miles from the General Post Office in the city of London; and the said commissioners, or the person so authorized to grant such licences as aforesaid, shall, at the time of granting every such licence, and at all other times when necessary, grant to the persons applying for such licences respectively a numbered plate, to be fixed upon every such hackney carriage in the manner hereinafter mentioned, upon which said plate there shall be painted a number corresponding with the number which shall be inserted in such licence, together with such device as the said commissioners shall think fit to cause to be painted on every such plate; and such plate shall be known and distinguished from other plates, required by this act to be fixed upon hackney carriages, by the name of the Stamp Office Plate.

Sect. 30. And be it enacted, that it shall be lawful for any two of the commissioners of stamps to grant licences, under their hands, to such persons as they shall think fit and proper to act as watermen

or assistants to the drivers of hackney carriages, at the standings or places of resort where hackney carriages usually stand or ply for hire, which said licence shall be granted in such form as the said commissioners shall think fit; and every such licence shall be dated on the day on which the same shall be granted, and shall specify the true Christian name and surname, and place of abode, of the person to whom the same shall be granted, and shall specify the standing or place of resort at which he shall be thereby authorized to act as such waterman or assistant as aforesaid; and as often as such waterman or assistant as aforesaid shall change his place of abode, notice in writing of such change, signed by such waterman or assistant, shall forthwith be given to the proper officer, at the head office for stamps in Westminster, and the licence of such waterman or assistant shall at the same time be produced to such officer, who shall indorse thereon and sign a memorandum of such notice, or in default thereof such licence shall be void; and if any person shall act as such waterman or assistant as aforesaid, at any such standing or place of resort as aforesaid, without first having duly obtained and having in force a licence from the commissioners of stamps, authorizing him in that behalf, he shall forfeit forty shillings.

Sect. 35. And be it enacted,

law; it excepts carriages which are standing on a place licensed by the commissioners. If not within the enacting part of the section, then the case is clearly within the exception contained in it. And this act likewise directs a

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that every hackney carriage which shall be found standing in *any street or place*, and having thereon any of the numbered plates required by this act to be fixed on hackney carriages, shall, unless actually hired, be deemed to be plying for hire, although such hackney carriage shall not be in any standing or place usually appropriated for the purpose of hackney carriages standing or plying for hire; and the driver of every such hackney carriage, which shall not be actually hired, shall be obliged and compellable to go with any person desirous of hiring such hackney carriage; and upon the bearing of any complaint against the driver of any such hackney carriage for any such refusal, such driver shall be obliged to adduce evidence of having been and of being actually hired at the time of such refusal, and in case such driver shall fail to produce sufficient evidence of having been and of being so hired as aforesaid, he shall forfeit forty shillings.

Sect. 37. And be it enacted, that it shall be lawful for the proprietor or driver of any hackney carriage, which shall be licensed under the authority of this act, to stand and ply for hire with such carriage, and to drive the same on the Lord's day, any former act or acts to the contrary notwithstanding; and that such proprietor or driver, who shall so stand or ply for hire as aforesaid, shall be

liable and compellable to do the like work on the Lord's day as such proprietor or driver is, by this act, liable or compellable to do on any other day of the week.

Sect. 51. And be it enacted, that if any proprietor or driver of any hackney carriage shall stand or ply for hire with such hackney carriage, or suffer the same to stand across any street, or common passage or alley, or alongside of any other hackney carriage, or two in a breadth, or within eight feet of the curb-stone of the pavement in any such street, or common passage or alley; or if any such proprietor or driver, or any waterman or other person, shall feed the horses of or belonging to any hackney carriage, in any street, road or common passage, save only with corn out of a bag, or with hay which he shall hold or deliver with his hands; or if the driver of any hackney carriage shall refuse to give way, if he conveniently can, to any private coach or other carriage, or shall obstruct or hinder the driver of any other hackney carriage in taking up or setting down any person into or from such other hackney carriage; or if any such proprietor or driver shall wrongfully, in a forcible or clandestine manner, take away the fare from any other such proprietor or driver, who, in the judgment of any justice of the peace, before whom any complaint of such offence shall be heard, shall

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specific mode of proceeding, viz. to lay an information before a magistrate previous to a seizure. If therefore they seek to justify under this act, they should have gone before a magistrate in the first instance. But the General Hackney Coach Act, 1 & 2 Will. 4, c. 22, repeals both the former statutes. It substitutes the commissioners of stamps for the old body of commissioners of hackney coaches, and appears to give an unlimited right to carriages licensed by them. Several of its sections imply that such carriages may ply for hire in any street whatever, or, at the least, on any stand licensed by them. See especially sects. 4 and 7. Sect. 30 gives a general power to license watermen, and consequently to license stands also. Sect. 35 enacts that every hackney carriage found standing in any street or place shall be deemed to be plying for hire. Sect. 37 supports the same view. Sect. 51 speaks of hackney carriages standing within eight feet of the curb-stone *in any street or alley*. Sect. 54 is material: it empowers the authorities of the city of London to appoint stands, and regulate the number of hackney carriages within that city and the bo-

appear to be fairly entitled to such fare; every such proprietor, driver, waterman, or other person so offending, shall forfeit twenty shillings.

Sect. 54. And be it further enacted, that it shall be lawful for the court of mayor and aldermen of the city of London, from time to time, to appoint proper places in the said city of London and liberties thereof, and in the borough of Southwark, where hackney coaches may stand and ply for hire, and to make such orders for regulating the number of such hackney coaches to stand in such places respectively, and the distances at which they shall stand from each other, and the times at


and during which they may stand and ply for hire, and such other orders and regulations for the better ordering and regulating the said hackney carriages, and the drivers or other the person or persons having the management thereof respectively, as to the said court of mayor and aldermen shall seem proper; and from time to time to alter, amend or repeal such rules, orders and regulations, and to make others in the room thereof." Forfeiture of penalty, not exceeding 5*l.*, by drivers or persons having management of hackney carriages, who may contravene such rules, orders and regulations.

rough of Southwark. It shews therefore that, without being so specially empowered, those authorities could not do so. The vestry of Marylebone, not being specially empowered in like manner, cannot therefore do so: their former powers are taken away by the act, and no fresh powers are conferred upon them.

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*M. D. Hill*, for the defendants. The attempt on the other side is to shew that a series of substantive enactments is repealed by implication. The Street Act, 57 *Geo. 3*, c. xxix. gave the vestrymen a general power to remove all carriages, limited by certain exceptions. The plaintiff must therefore shew either that the Street Act is repealed, or that he is within the exception in sect. 65 in favour of coaches, chariots and chairs duly licensed, and "which stand for hire according to the statutes and bye-laws made for those purposes." Now cabriolets are included in the general word *carriage* in the enacting part of the section; but not within "coaches, chariots or chairs," as mentioned in the exception. Again: even if within the benefit of the exception, the cabriolet must both be "duly licensed," and "standing in obedience to statutes and bye-laws." If then the vestry have the power (by the Street Act confirming their local act) to direct and regulate stands for all hackney carriages, the cabriolet in question was not standing "in obedience to statutes and bye-laws." Either way, therefore, the defendants are justified. With respect to the validity of the mode of proceeding, that question is not raised by the special case. It does not appear from that case whether there was or was not a conviction before a magistrate previously to the seizure. *Rex v. Rawlinson* (a) shews that where commissioners of pavements had, by an act of parliament, power to "direct and regulate hackney coach stands," they had a power to remove coach stands: and the words in the St. Marylebone local act are stronger. Then, as to the last question raised. It is not clear, in the first place, that the parishes of

(a) 6 B. & C. 23; S. C. 9 D. & R. 7.


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St. Pancras and Marylebone are within the limits mentioned in the Hackney Coach Act: they are not in the bills of mortality. Next, the local act in question is not included among those which are repealed expressly by sect. 1 of the Hackney Coach Act. Nor is it repealed by fair implication. Sect. 4 does not give an unlimited power to ply: it only contains a definition of a hackney carriage. Sect. 7 merely gives a general power of licensing *carriages* to the commissioners. Sect. 30 cannot be extended to give a general power to license *stands*. Sect. 35 does not recognize an unlimited power in hackney coachmen to ply wherever they please: it merely prevents the question, whether they are plying or not, from being raised between them and their customers. Sect. 51 is a prohibitory, and not an enabling clause. Sect. 54 may have been introduced *ex abundanti cautela*; and, in conclusion, it cannot surely be contended that drivers may establish themselves wherever they please, except in London and Southwark, provided they are not within eight feet of the curb-stone, and that all local acts whatever are repealed, although not named.

Sir J. Campbell A.G., in reply. St. Pancras and Marylebone are included in the first section of the Hackney Coach Act, under the word "suburbs." It is clear from the expressions contained in so many sections of that act, that there was an intention to repeal all regulations respecting confinement to particular stands. And sect. 54 shews, that in the opinion of the law officers of the city (whose duty it is to watch bills in their passage through parliament, and to take notice of any clauses which may trench on the privilege of the city), under the general provisions of the act, hackney carriages might have circulated anywhere within its limits, and that prior acts respecting the city were repealed. They therefore procured the introduction of this section to give the city authorities the requisite power.

*Cur. adv. vult.*

Lord DENMAN C. J. in this term delivered the judgment of the Court.—The question stated for the consideration of the Court in this case, depends upon the construction of several acts of parliament, which were passed at different times and for different purposes, and not in *pari materiâ*, nor connected with each other. The first act is the 35 *Geo. 3*, c. lxxiii, by the 95th section of which the vestrymen of the parish of St. Marylebone were empowered to direct and regulate such stands for hackney coaches and chairs, as they in their discretion should think proper, within their limits; and the penalty for not complying with their regulations was 40*s*. At that time the statute 9 *Anne*, c. 23, was in force, which (s. 16) authorized the commissioners of hackney coaches to make bye-laws for their regulation, and many other general acts respecting hackney coaches had been subsequently passed.

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This Court decided in the case of *The King v. Rawlinson* (a), that vestrymen, under a precisely similar local act, might not only regulate the conduct of hackney coachmen at the stands, but might appoint and limit the number and locality of the stands within the limits of their act.

The 55 *Geo. 3*, c. 159, which first established carriages with two wheels, and drawn by one horse, puts them in all respects upon the same footing as hackney coaches, and (s. 4) expressly enacts that all laws and statutes applicable to the one class shall be equally so to the other. The recent statute 1 & 2 *Will. 4*, c. 22, has repealed the 9 *Anne*, but has not in direct terms repealed the 35 *Geo. 3*, nor do we find any of its provisions to be inconsistent with that act. Without, therefore, giving any opinion whether the statute 1 & 2 *Will. 4*, in general authorizes hackney carriages to ply wherever their drivers please, or whether the commissioners have any general power to appoint stands, as they certainly have to licence watermen to particular stands, we think that the power of the vestrymen, under the 35 *Geo. 3*,

(a) 6 B. & C. 23; S. C. 9 D. & R. 7.

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is not superseded, and that they had full authority to make the regulation, by which the use of the stand in question was prohibited. The plaintiff therefore was wrong in using that stand, and no doubt became liable to the penalty of 40s. under the 35 Geo. 3. But the question is, whether the defendants were authorized to seize the plaintiff's cabriolet on that account. The 57 Geo. 3, c. xxix, of local and personal acts, sect. 65, enacts "that if any person shall set, lay, or place any coach or other carriage upon any of the said carriage ways (except such coaches, chariots or chairs, as have been or shall be hereafter licensed by the commissioners for regulating and licensing hackney coaches, chariots and chairs, and *which stand for hire, according to the statutes and bye-laws made for those purposes*), and shall neglect to remove them when required by the proper officers, those officers may seize them."

The defendants are the proper officers, and though some doubt was raised in the course of the argument as to the necessity of a conviction, and as to the manner in which the cabriolet in question was dealt with, we think that the question before us turns only upon the legality of the original seizure, and is purely a question as to the construction of the above clause in the 57 Geo. 3.

It is argued that a cabriolet is not within the exception in this clause, although it is a carriage within the enacting part of the clause. It is said that the 55 Geo. 3 had been in operation two years when the 57 Geo. 3 was passed, and that if cabriolets had been intended to be included in the exception, the word "carriages" would have been used, and not merely "coaches and chariots." We should be sorry to find ourselves forced to adopt such construction, owing to (what we must consider to be) the accidental omission of a word. But we do not feel obliged to give any positive opinion on the subject. For the purposes of the present case, we will assume that a cabriolet is within the exception, or suppose that a hackney coach had been seized, still it must be one *which stands for hire, accord-*

*ing to the statutes and bye-laws made for those purposes.* We think the exception applies not to all carriages placed under certain jurisdictions, but to such only as are actually conforming to the lawful regulations. Now the cabriolet in question stood for hire contrary to the regulation of the vestrymen, legally made under 35 Geo. 3, and of which the plaintiff had notice. Is then that regulation a bye-law within the meaning of the exception? It is to be observed, that at the time when the 57 Geo. 3 was passed, the 9 Anne, c. 23, was in force, which speaks of bye-laws to be made by the commissioners for hackney coaches, and to be approved of by the Lord Chancellor, the Chief Justice, and Chief Baron. Probably those were the bye-laws in the immediate contemplation of the legislature, and the case above referred to of *The King v. Rawlinson* (a), does not shew that this regulation of the vestrymen can be treated as a bye-law. Still, as the vestrymen had, by statute 35 Geo. 3, power to direct at what places coaches and cabriolets should stand for hire, in the parish of St. Marylebone; and as the right of hackney coaches and cabriolets to stand for hire anywhere in the streets arises from statute law, not inconsistent with the statutable regulation of the vestrymen, it seems impossible to say that a cabriolet standing for hire in a place prohibited by that regulation, *was standing for hire according to the statutes made for those purposes.* It follows that the cabriolet in question was not protected by the exception in the statute 57 Geo. 3, even supposing the words of that exception to extend to cabriolets, and supposing the regulation of the vestrymen not to be a bye-law within the same exception. It was therefore liable to seizure, and a verdict must be entered for the defendants.

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Judgment for the defendants.

(a) 6 B. & C. 23; S. C. 9 D. & R. 7.

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## PICKARD v. SEARS and another (a).

Goods in the possession of *A.* were seized in execution, and while they were in the custody of the sheriff the plaintiff came twice to the premises, but made no claim to them; the plaintiff saw several times the defendant's attorney and told him that he was a creditor of *A.*, but did not state that he had any mortgage on the goods, or that he had any claim to them, and he asked the attorney's advice as to the best course to be pursued; the attorney, after giving some advice, stated that the defendants were about to purchase the goods from the sheriff. The defendants having purchased accordingly, in an action of trover brought by the plaintiff as *bonâ fide* mortgagee of the goods:—  
Held, that it was a question for the jury, on an issue that the plaintiff was not possessed of the goods, whether the plaintiff by his conduct had not estopped himself from disputing the sale.

**TROVER** for machinery. Pleas: 1. Not guilty. 2. That the plaintiff was not possessed as of his own property, &c.

At the trial before Lord *Denman* C. J., at the sittings in London after Trinity term, 1835, it appeared that the goods in question had been in the possession of a person named *Metcalfe*, up to the time of their seizure by the sheriff under a writ of *fi. fa.* issued in April 1834, in a suit of *Hill v. Metcalfe*. The sheriff had sold the goods to the defendants in August, 1834. The plaintiff rested his title on a mortgage to him of the goods by *Metcalfe* of the 15th January, 1834. After seizure by the sheriff and after sale by him to the defendants, the plaintiff gave the defendants notice of this mortgage and demanded possession of the goods; but it appeared that after the sheriff had entered into execution and whilst a sale was contemplated, the plaintiff had come twice to the premises of *Metcalfe*, but had given no notice to any one of his claim on the goods. He also, in company with *Metcalfe*, called on Mr. *Hill's* attorney several times, and stated that *Metcalfe* was his creditor for 500*l.*, but did not state that he had a mortgage on the goods, or that he claimed them as his own, and he consulted him as to the best course to be adopted. Mr. *Hill's* attorney advised the plaintiff and *Metcalfe* to borrow a sum of money for the purpose of paying off the execution creditor, which, however, could not be effected: he also communicated to the plaintiff that the defendants were about to purchase the goods from the sheriff. It was admitted that the purchase by the defendants was *bonâ fide*, and without notice of the mortgage. It was contended for the defendants, that it should be left to the jury to say whether the sale to the defendants had not been made with the

(a) This case was decided in Easter term last.

concurrence of the plaintiff, but the Lord Chief Justice thought there was no evidence of this fact, and in summing up to the jury, he directed them to find a verdict for the plaintiff if they thought the mortgage a *bonâ fide* transaction. The counsel for the defendants then applied for leave to insert a plea of leave and licence, but his lordship refused, and the verdict passed for the plaintiff.

In Michaelmas term, 1835, Sir *F. Pollock* obtained a rule nisi for a new trial; against which,

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*Erle* and *Sewell* shewed cause in Hilary term, 1837 (a). The mortgage being found to be *bonâ fide*, it is clear that the property is in the plaintiff, and the goods seized and sold are his goods, and not *Metcalfe's*. This is the only question that arises on the pleadings. [*Coleridge J.* If a party stands by and sees his goods sold without making any objection, it is a strong fact for the jury. It appears that the plaintiff was twice on the premises after the seizure.] The plaintiff was not bound to give notice, and if his consent to the sale is relied upon, it should have been pleaded.

Sir *F. Pollock* and *Cleasby*, *contrâ*. It is quite clear that the plaintiff allowed the sale to go on without any opposition or intimation of right to interfere. By so doing, the defendants were entitled to suppose that if they bought, the plaintiff could have no ground for disputing the sale. The rule of law is, that if parties, by their admissions or conduct, induce others to engage in any act, they are afterwards estopped by their admissions; per *Bayley J.* in *Heane v. Rogers* (b); per Lord *Tenterden C. J.* in *Graves v. Key* (c). The defendants therefore are entitled to a new trial, in order to obtain the verdict of a jury as to the admissions of the plaintiff.

*Cur. adv. vult.*

(a) January 16th, before Lord  
*Donnan C. J.*, *Williams* and *Col-*  
*eridge Js.*

(b) 9 B. & C. 536; S. C. 4 Mann.  
 & R. 486.

(c) 3 B. & Ad. 318, n.



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Lord DENMAN C. J. in Easter term, 1837, delivered the judgment of the Court.—This was an action of trover for machinery and other articles, brought by a mortgagee of one *Metcalf*, the former owner, against a purchaser from the sheriff, under an execution levied against that former owner. The pleas were—1st. Not guilty. 2d. That plaintiff was not possessed of the property as his own.

Sufficient evidence of a *bonâ fide* mortgage was adduced to prove that the property had been assigned to the plaintiff some months before the execution, and no doubt was ultimately made that the property was in fact his. The mortgagor had, however, remained in possession carrying on his trade till the execution issued, and the defendants made it plainly appear, that even after the sheriff had entered, and even after the plaintiff knew that a sale was in contemplation, he had come to the premises and given no notice of his claim; on the contrary, he called on the execution creditor's attorney with the mortgagor, and consulted him about the state of affairs and the course to be taken. He stated indeed that he was *Metcalf's* creditor to the amount of 500*l.*, but never spoke of the mortgage or claimed the goods as his own, though the attorney told him that he had some intention to sell them.

The defendants purchased *bonâ fide* and in total ignorance that the plaintiff had any interest. The bill of sale was executed on the 12th of August, the plaintiff's first application was made in December, when he demanded the sum advanced; which being refused, he demanded the goods; they were refused also.

The difficulty was to give the defendants the benefit of these facts under the pleas on record. After I had summed up the evidence, an application to amend, by introducing a plea of leave and licence, was for obvious reasons refused.

The defendants' counsel then contended that the plaintiff's conduct amounted to a concurrence in the sale, so as to make him in truth the vendor, and divest the property. I thought there was no evidence of this, and declined to

take the jury's opinion whether the facts proved it. We granted a rule for a new trial, being desirous of considering whether this view of the case ought not to have been submitted to the jury.

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Much doubt has been entertained whether these acts of the plaintiff, however culpable and injurious to the defendants, and however much they might be evidence of the goods not being his in the sense that many persons, and amongst others the defendants, would be naturally induced thereby to believe that they were not furnished with any real proof that they were not his. His title having been once established, the property could only be divested by gift or sale, of which no specific act was even surmised. But the rule of law is clear, that where one, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time; and the plaintiff in this case might have parted with his interest in the property by verbal gift or sale, without any of those formalities that throw technical obstacles in the way of legal evidence. And we think his conduct in standing by and giving a kind of sanction to the proceedings under the execution, offered facts of such a nature, that the opinion of the jury ought, in conformity to *Heane v. Rogers* (a) and *Graves v. Key* (b), to have been taken, whether he had not, in point of fact, ceased to be the owner. That opinion, in the affirmative, would have decided the second issue on the record in favour of the defendants.

Rule absolute.

(a) 9 B. & C. 686; S. C. 4 Mann. & R. 468. (b) 3 B. & Ad. 318, n.



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## IN THE EXCHEQUER CHAMBER.

The Rev. VERE JOHN ALSTON, Clerk, v. ATLAY.

1. If an incumbent, with cure of souls, below 8*l.* a year in the king's books, be instituted to another benefice, the first living is absolutely void as to the patron, (although not so as to incur a lapse,) and being void, it is inalienable: Therefore where the patron of a living under 8*l.* a year, the incumbent of which had been subsequently instituted in another benefice, sold the advowson:—Held, that as the right to present to the living had vested in the patron (although he had no notice of the cession,) the right to the presentation did not pass with the advowson.

2. The incumbent of a benefice, void as aforesaid,

may sue for tithes from his parishioners till sentence of deprivation, or until another clerk is presented by the patron.

**DEBT**, by the plaintiff in error, against the defendant in error, on the 2 & 3 *Edw.* 6, c. 13, for the treble value of tithes not set out, brought by the plaintiff as rector of Cowsby, in the county of York (a). Plea, [before the new rules] nil debet.

At the trial before *Parke B.*, at the Yorkshire spring assizes, 1835, a verdict was found for the plaintiff, subject to the opinion of the Court upon a case, which was afterwards, by the consent of the Court, turned into a special verdict, which the jury found in substance as follows:—

That the rectory of Cowsby is a benefice under the value of 8*l.* in the king's books. The plaintiff was instituted and inducted in 1816, and duly subscribed and read the articles. For many years after the plaintiff became rector of Cowsby, the defendant, who was a farmer there, regularly paid his tithes to the plaintiff as the rector, and continued to do so down to Michaelmas, 1832. The defendant did not pay to the plaintiff the value of the tithe claimed by him in 1833, nor did he set out the same, although he had received due notice on behalf of the plaintiff to set out his tithe in kind,—the same being claimed by the Rev. *Geo. Wray*; and that defendant carried away his crops without setting out his tithes.

That in 1829 the plaintiff was instituted and inducted to the rectory of Odell, in the county of Bedford, (distant 100 miles from Cowsby,) upon the presentation of his brother, and subscribed and read the articles. Odell is a benefice with cure of souls, of higher value than 8*l.* in the king's books.

(a) See 6 N. & M. 686.

That in November, 1831, *Justinian Alston*, Esq., the plaintiff's brother, who was owner of the manor of Cowsby and patron of the rectory of Cowsby, sold and conveyed such manor and advowson to *Geo. Lloyd*, Esq.

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That in 1832, Mr. *Lloyd*, then thinking that the rectory of Cowsby had become voidable in consequence of the acceptance by the plaintiff of the rectory of Odell, presented the Rev. *Geo. Wray*, who was thereupon instituted and inducted, and read and subscribed the articles.

The common errors were assigned upon the record. Joinder in error. The case was argued before *Tindal* C. J., *Parke* B., *Bosanquet* J., *Bolland* B., *Gurney* B., and *Coltman* J., on May 11th, 1837.

*Wightman*, for the plaintiff in error. The question in this case is, whether the patron of a living which has become voidable, can convey the right to present to the next turn, so as to avoid simony. The first living in this case being under the value of 8*l.* in the king's books, is not rendered void by 21 *Hen.* 8, c. 13, s. 9, but only by the canon law. But it is submitted that the living was void *de jure*, and therefore that it is the same as if the living were empty altogether, in which case it is evident no sale of the next turn could be made. In *Wolforstan v. The Bishop of Lincoln* (a) the ground put forward in argument, according to the report in *Wilson*, why the next turn to a vacant living could not be sold, was, that it was a chose in action; but in *Burrough* it appears that Lord *Mansfield* C. J. and *Wilmut* J. disclaimed that as a factitious reason, and put it on the score of public utility, the better to guard against simony. The present case is quite as much within the mischief contemplated by the law against simony as if the living were void under the 21 *Hen.* 8, c. 13. In 3 *Burn's* Eccl. Law, 96, it is laid down, "if the first benefice was of less value than 8*l.* a year; yet, by his acceptance of a second with cure, it is at this day *in jure* void by the re-

(a) 2 Wils. 174; S. C. (in error) 3 Burr. 1504; 1 W. Bl. 490.

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ceived canon law; . . . but some opinions are, that the church is not void but by deprivation; . . . but this is to be understood, that it is no cession to the disadvantage of the patron, so as to make a lapse incur from the time of such cession, no notice having been given to the patron thereof. For until after such clerk shall have been actually deprived of his first benefice, and notice thereof given to the patron, he, though he may, yet need not to present; but then after such deprivation the church is void *in facto* and *in jure*, so that he must at his peril present: *Wats. c. 2.*" This distinction, however, does not affect the ground on which the plaintiff's case rests; for no question is raised in this case as to a lapse having occurred. If then the true ground of the decision in *The Bishop of Lincoln v. Wolforstan* (a) be, that it is against public policy that the presentation to an empty church should be sold, undoubtedly the same law must hold as to a church which the grantor may declare void at pleasure. In one sense the church may be said to be full; but it is with a nominal incumbent, who may be turned out immediately. This case is therefore much stronger than *Fox v. The Bishop of Chester* (b), where there was an incumbent both *de jure et de facto*: here there is one only *de facto*. In *Halton v. Cove* (c) the distinction between a living void *de jure* and *de facto* was much discussed. [Parke B. Who, do you contend, would present to the benefice in case of the death of the patron, supposing him not to have sold the turn, the heir or the executor?] The executor, as being a fruit-fallen. The sale therefore to Mr. Lloyd of the next turn was void,—first, as being a chose in action; second, as being contrary to the policy of the law.

*Tomlinson*, contra. The effect of accepting another benefice with cure of souls, where the first is under the value of 8*l.*, is not to make it void, but only voidable, at

(a) 2 Wils. 174; S. C. 3 Burr.  
1504.

(b) 4 D. & R. 93; 6 Bing. 1.

(c) 1 B. & Ad. 538.

the election of the patron. In some of the books the word "void" is used, but it is clear from the context that voidable is meant. If it be not void, it is not a fruit-fallen or a chattel disannexed from the advowson, but it would pass with the advowson. There is no authority for saying that it could go to the executor. In *Rennell v. The Bishop of Lincoln* (a), where this doctrine was discussed, there was an actual vacancy of the benefice. All the authorities there cited by *Patteson*, *arguendo*, to shew that the presentation vests in the executor of the patron, are cases where the benefice was void. Thus *Fitz.* N. B. 33, P. says, "if a man be seised of an advowson in gross or in fee, appendant unto a manor, and the advowson void, and he dieth, his executor shall present, and not the heir, because it was a chattel vested." *Bro. Abr.* Presentments al Eglises, pl. 34, is to the same effect. *Armiger v. Holland* (b), *Digby's case* (c), *Winchcombe v. The Bishop of Winchester* (d), *Anon.* (e), all shew that the first living is only rendered void at the election of the patron. If the patron made no election, the first incumbent is entitled to sue for his tithes: 2 *Roll. Abr.* 361, pl. 6. In a note to *Gibs. Cod.* 906, the first living is said to be voidable; and in *Betham v. Gregg* (f), *Tindal C. J.* laid down, "it is equally clear, that, where the former living is below the value of 8*l.*, and the incumbent has accepted a second benefice with cure, so far as the patron is concerned, the former benefice is not absolutely void, but voidable only at the election of the patron." The decision in *Halton v. Cove* (g) proceeds on the same distinction. All these cases shew, that as *Mr. Alston* did not exercise his election, the benefice was full. It is true that the bishop might have proceeded to deprivation; but even after deprivation it would have been for *Mr. Alston*, or for his heir, to present within

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(a) 7 B. & C. 113; S. C. 9 D. & R. 810.

(b) *Moore*, 549; S. C. 4 Rep. 75 a.

(c) 4 Rep. 78 b.

(d) *Hob.* 165.

(e) *Godb.* 28, ca. 33.

(f) 10 *Bing.* 352.

(g) 1 B. & Ad. 538.

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six months. On what ground can it be contended that the personal representative of Mr. *Alston* had a right to exercise the option which his testator had declined to use? It could be of no benefit to the personal estate, as no profit could be made of it. It is therefore neither a chattel vested, nor a chose in action. [He was then stopped by the Court.]

*Wightman*, in reply. It is submitted that, as far as relates to the patron, the first living is void: it is only as to strangers that it is voidable. *Holland's* case (a) lays down, that where the benefice is under 8*l.*, it is void, so far as respects the advantage of the patron, and that the opinions that it is not void without deprivation are to be understood also for his advantage, viz. to prevent a lapse, if he does not present within six months; and in the passage cited from 2 *Roll. Abr.* 361, pl. 6, the distinction is taken, that it is void as to the patron, and he may present before deprivation; but as to a stranger it is not void till after deprivation. The fact of the patron being able to present instantly shews that the church is void, for it is only to an empty church that presentation can be made. The words used in presenting are, "ad ecclesiam jam vacantem:" Sir *W. Jones*, 337.

*Cur. ado. vult.*

TINDAL C.J., in last Trinity vacation, delivered the judgment of the Court, (after stating the pleadings and the special verdict,) as follows:—

It is to be observed that this special verdict does not find that the plaintiff was presented to the living of Cowsby by his brother *Justinian*; nor that he was presented to that of Odell by the same brother; nor that the patron had knowledge of the institution or induction of the plaintiff to the second living at the time he conveyed the advowson to Mr. *Lloyd*. The questions therefore which arise on this

(a) 4 Rep. 75 a.

record are two; first, whether, after an incumbent of a benefice under value has accepted, and been instituted and inducted to another benefice with cure of souls, the right of presentation, which accrues thereby to the patron, be assignable by law to another? and, secondly, whether the want of knowledge, on the part of the patron, of the fact of cession at the time of such transfer, causes any difference? That the *advowson* itself was assignable there is no doubt; but if the right of presentation was not under these circumstances assignable, then it follows that Mr. *Lloyd* had no right to present his clerk, and that the plaintiff in error, not having been deprived, and no new clerk having been presented, is still the incumbent, and still legally entitled to the tithes: 2 *Roll. Abr.* 361, pl. 6; *Watson's Complete Incumbent*, 8; *Comyn's Digest* (Eglise N. 5); and the concluding part of the judgment in *Halton v. Cove (a)*. And upon a careful consideration of the authorities we are compelled to come to the conclusion that the judgment of the Court of King's Bench is erroneous.

There is no question but that if a benefice be actually void by the death of an incumbent, by his resignation, or by cession under 21 *Hen.* 8, c. 13, or by deprivation, (*Cro. Eliz.* 811,) the right to present upon that avoidance is not capable of being transferred, either alone or with the entire advowson; it is a personal right, or interest, severed from the advowson, and vested in the person of him who was patron at the time—a chose in action, which is not assignable, and which is designated in the books by a great variety of names, all indicating its personal and unalienable quality. (See those collected in *Mirehouse v. Rennell (b)*.)

The question then is, whether the right to present, caused by the cession in this case, was a chattel disannexed from the advowson, and vested in the person of Mr. *Justinian Alston* before the transfer to Mr. *Lloyd*; or not? If it was, it could not be assigned.

There is no doubt but that this right of presentation


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(a) 1 B. &amp; Ad. 559.

(b) 8 Bing. 490—518.



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accrued by the canon law, namely, by the 4th Council of Lateran; but it is equally clear that this canon has been recognised in this country, and has become a part of the common law of the land: *Holland's case* (a), *Digby's case* (b), *Evans v. Ascough* (c). The point to be decided is, what is the nature of the right given by that canon to the patron? Is it an immediate *right* of presentation in the then patron, when he chooses to exercise it, without doing any thing previously to avoid the interest of the then incumbent—or is it only a right to avoid that interest by some act, and *then* to present; or to avoid it, by the act of presentation only, per se, such interest of the incumbent being valid, and the church full as to the patron in the meantime? If the former be the true answer, then, we conceive, such right is like every other vested and complete right of presentation—a personal thing, and incapable of transfer. If the latter, then it is probable that the right would pass with the advowson to the new patron.

Now, although the books use some variety of expression on this subject, in some cases the benefice being said to be “void”—in others, “void as to the patron for his benefit”—in some, “to be void at his election”—and in others but of a comparatively recent date, “to be voidable,”—yet in none is it intimated that the patron has not an immediate right to present, as to a void church, *without doing any further act* in order to make such presentation valid. And the substance of the authorities is, that he has a complete right to present upon the cession, by institution to the second benefice, but does not lose his right by *lapse* till sentence of deprivation and notice by the bishop, from which time the six months begin to run.

It may be advisable to take a short review of these authorities. The 4th Council of Lateran is to this effect:—  
 “Quicumque receperit aliquod beneficium curam habens animarum annexam, si prius tale beneficium habebat, *eo sit, ipso jure privatus*; et si forte illud retinere contenderit,

(a) 4 Rep. 75 a.

(c) Latch, 243.

(b) 4 Rep. 78 b.

etiam alio spoliatur. *Is quoque ad quem prioris spectat donatio, illud post receptionem alterius liberè conferat cui merito viderit conferendum*" (a).

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The fair construction of the words of this canon is, that upon acceptance of the second benefice, the clerk should be deprived of the first by the *law itself*, "*jure ipso*," without any actual sentence of deprivation, and the patron may then freely present a clerk without any other act to be done, as on a deprivation. The constitution itself (it will be seen afterwards) operates in the nature of a general sentence of deprivation. And that this is the true construction of the canon is confirmed by many authorities. One of the earliest cases on this subject is *Holland's case* (b), in which the Court held "the benefice to be void, not by the common law, but by the constitution of the Pope, of which avoidance the patron might take notice if he would, *and might present if he would*, without any deprivation; but because the avoidance accrued by the ecclesiastical law, no lapse incurred without notice, as upon deprivation or resignation, and yet the patron might present, and take upon him notice, if he would; so that for the benefit of the patron *the church is void*, but not for his disadvantage."

In the report of the same case in *Moore*, 542, the first benefice is said "to be void by the common law, without sentence declaratory, at the *election* of the patron;" which really means the same thing, and is so explained by the context, "that he may, if he will, present without notice." There is no intimation in this or any other case that any act of the patron is necessary to avoid the benefice before presentation.

In the report in *Cro. Eliz.* 601, the first benefice is said to be "void" by order of the common law.

In *Digby's case* (c) *Popham C. J.* and the whole Court state, that "although by the institution to the second benefice, the first is void by the ecclesiastical law without any deprivation or sentence declaratory; yet no lapse shall

(a) *Gibbs. Cod.* 904, n.

(c) 4 *Rep.* 79 a.

(b) 4 *Rep.* 75 a.

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incur *unless notice be given to the patron*, no more than if the church became void by resignation or deprivation, and yet the patron may take notice, if he will, and present according to the said constitution."

In *Rex v. Archbishop of Canterbury* (a) the church is said to be "void, but not so that the lapse incurred." So in *Fitzherbert's N. B. 34, L.* the first benefice is said to be "void." In *Edes v. Bishop of Oxford* (b) it is also said to be "void." In *Winchcombe v. Bishop of Winchester* (c) it is said, "a thing may be void or not void, at the election of him whom it concerns, as in *Holland's case* (d). The patron of the church may take it as void, and present presently, or may leave it as full till sentence of deprivation." It is remarkable that there the church is not said to be full. In the case in *Sir Wm. Jones's Rep. 334*, (reported also in *Cro. Car. 354*,) *Rex v. Priest*, the law is laid down to the like effect as in *Holland's* and *Digby's* cases, and a very clear explanation given of the Council of Lateran. It is said to have been "held first, by the greater part of the justices, that before the statute of 21 *Hen. 8*, the first church was void, and the patron could present, if he would, without sentence declaratory, by the said constitution of Lateran; for the words are 'ipso jure sit privatus,' and do not mention any sentence of deprivation. By the same canon a church shall be void without sentence if one be consecrated bishop. So for the same reason, by the same words, the first benefice shall be void by the taking of the second benefice. If a party resigns, or be deprived by a particular sentence for crime, the church shall be void; and, à multò fortiori, the constitution (which is a general sentence of deprivation, as is said in 10 *Edw. 3, 2*,) will make an avoidance; but, true it is, in the said case, the patron is not bound to take notice of it, being an ecclesiastical constitution. So upon a particular deprivation or resignation, notice ought to be given to the pa-

(a) Hetley, 125.

(b) Vaughan, 18.

(c) Hobart, 165.

(d) 4 Rep. 75 a.

tron, otherwise no lapse, yet there is an avoidance." And it was agreed on the other part, according to the said cases, that the patron can present, if he will, without notice or sentence declaratory; and that could not be, unless the church was void before the presentation, for the form of presentation is "ad ecclesiam jam vacantem," which presupposes vacancy before the presentation.

In *Le Roy v. L'Evesque de Londres and Baldock*(a), "it was resolved by all the four judges, that where the first living was under value, the acceptance of a second was an avoidance by the common law ipso jure, without any deprivation, so that the patron could present, if he wished, without any sentence of deprivation; and the church being once void as to the patron to present, a dispensation, by the archbishop afterwards, came too late, and could not restore the clerk to his benefice." And *Jones* says, "it seemed to him clearly, that by the institution and induction to the second benefice, the first being under value, the first benefice was void, as well as if it was above value; but the difference in the last case is, that the patron must take notice at his peril, for it is void by the act of parliament; and the words are, 'it shall be void as if the incumbent were dead;' and if he does not present within six months, the living will lapse. But in the first case there was no lapse, and the patron might present." And he also gave his opinion, "that if the bishop gave notice to the patron of the taking of the second benefice, if he does not present within six months, there would be a lapse as upon deprivation or resignation; and if the benefice was not void, but there ought to be a deprivation, then the presentment and institution upon that would be a void institution, which is not so, for the first institution and incumbency is made void by taking the second benefice." And the case of *Leak v. Bishop of Coventry and another* (b) has a very important bearing upon the question now under discussion; for it is a direct

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(a) Sir Wm. Jones, 404.

(b) Cro. Eliz. 811.

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authority that where the bishop, after deprivation, but without giving notice of such deprivation, collated, and the patron afterwards grants the advowson in fee, and the clerk collated by the bishop dies, *the grantee* of the advowson cannot bring a quare impedit; and the reason given is, "that when the original patron had right to present upon the deprivation as in his turn, although the collation by the bishop without notice was not good, nor ousted him, but that he always might have presented, and ousted the incumbent by his bringing of a quare impedit, *yet it is but a thing in action*; and when he hath granted the advowson over, the grantee cannot have this thing in action."

It is only in more modern times, we believe, that the benefice is said to be "voidable." In *Gibson's Codex*, 906, in a note, it is said to be "voidable;" but that word is used as an explanation of the former part of the note. In the very modern cases of *Betham v. Gregg* (a), *Apperley v. Bishop of Hereford* (b), the word "voidable" is used. In *Hallon v. Cove* (c) the word "voidable" is coupled with the words "perhaps actually void." We do not however understand that by the use of this word "voidable" it is intended that any previous step is necessary before the patron presents, for there is no authority whatever for such a position. It means merely that if the patron does not elect to present, the incumbent may hold the living: it does not mean that the living is *full* as against the patron in the meantime.

It cannot well be that the living is full as relates to the patron, and that the presentation itself determines the interest of the clerk; because it is clear that the presentation must be *when* the church is already *void*, and proceeds upon that assumption. An authority for this position has been before cited; and Lord *Coke*, in 1 *Roll. Rep.* 213, citing *Smales' case*, 17 *Edw. 3*, 59, distinctly says the church ought to be void before he can present; for if the church

(a) 10 Bing. 352.

(c) 1 B. &amp; Ad. 558.

(b) 9 Bing. 681.

be voidable, no presentation can be made. *Rud v. Bishop of Lincoln* (a) is another authority that the right to present implies that the church is then *void*.

The result of these authorities is, that upon institution to the second living, the first is void *as to the patron*, but not so as to incur a lapse, without sentence of deprivation and notice by the ordinary, or at least until notice by the ordinary; and if void as to him, he cannot deal with the fallen right of presentation at all; it is a personal inalienable right.

The second question, whether the want of a notice of the cession makes any difference, is readily disposed of. If the right to the fallen presentation be a personal right, disannexed from the advowson, it is clear that want of knowledge of the vacancy, by the patron, cannot alter the quality of that right; it cannot make a *personal* thing *real*; it will not re-annex it to the advowson, any more than want of notice of rent being in arrear—(which bears the closest analogy to the subject-matter under consideration)—would enable the vendor of a reversion to transfer the rent in arrear with the reversion. The only point of view in which it could be important is with reference to the rights of the grantee of the advowson, as against the grantor, arising out of their contract.

For these reasons we are all of opinion that the judgment of the Court of King's Bench should be reversed.

Judgment reversed.

(a) Hutton, 66.

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**MARSTON v. ROE, on the several demises of WILLIAM JOHN FOX and another.**

1. Where marriage and the birth of issue operate as a revocation of a will of real property, it is in consequence of a rule of law independent of the intention of the testator, and therefore all evidence as to such intention is inadmissible.

2. The rule of law is, that where an unmarried man, without children, makes his will, devising the whole of his real property, and leaves no provision for any child of a subsequent marriage, the law annexes the tacit condition that subsequent marriage and the birth of a child operate as a revocation of the will.

3. Provision for the future wife only is not sufficient to prevent the revocation.

4. *Seemle*, that the fact of property acquired subsequently to the will, descending upon the issue, would not prevent the revocation of a will of the whole of the testator's then estate, made prior to his marriage and the birth of issue.

5. On an issue between an heir at law and a devisee, where the question was, whether the testator's will had been revoked by his marriage and the birth of a child, prior wills of the testator are admissible in evidence; as are also his declarations previous to his will relating to the dower of a future wife.

6. Parol evidence is admissible to prove that *A. B.*, who entered into a written contract for the purchase of an estate, bought it as the agent of *C. D.*

7. Where *J. F.* devised all his real estates at law and in equity to *W. M.*, subject to a life estate in them to *A. B.*, with whom he contemplated and afterwards contracted marriage, and by whom he left issue:—Held, that neither the contemplation of marriage nor the provision for his future wife in his will, operated to prevent its being revoked by his subsequent marriage and the birth of issue.

8. *Quere*, whether a will made by a testator in contemplation of marriage, in which he devises certain real estate to his future wife for life, operates to bar her right to dower, under 3 & 4 Will. 4, c. 105.

9. *Quere*, whether a devise to *E. C.* for life, or for so long thereof as she shall continue sole and unmarried, is defeated by her subsequent marriage with the testator, he having contemplated marriage with her at the time of the will.

**EJECTMENT** for lands in Staffordshire. On the trial, before *Alderson B.*, at the Gloucestershire spring assizes, 1836 (in which county the trial was had by suggestion), the jury returned a special verdict, in substance as follows:—On the 17th January, 1835, *John Fox* (deceased) made his last will in writing, duly executed to pass real estates, by which he devised several messuages, closes and lands, “unto and to the use of his friend *Ann Bakewell*, of Uttoxeter aforesaid, spinster, and her assigns, for and during the term of her natural life, or so long thereof as she shall remain sole and unmarried, subject nevertheless to impeachment for waste; and from and after the decease or marriage of the said *Ann Bakewell*, which shall first happen, he gave and devised the said messuages &c. to his relative *William Marston*. He then, after some devises and legacies, which he charged on his real property thereafter devised to *William Marston*, gave and bequeathed all his messuages,

farms, lands, tenements, tithes and hereditaments, and real estates, and parts and shares of such not before disposed of, and whether freehold, copyhold or customary, and whether in possession, reversion, remainder, contingency or expectancy, with all rights &c. thereto belonging, to the said *William Marston* and his heirs &c. for ever, subject as aforesaid, and to the payment of his debts; and he appointed *William Marston* and *John Horder* his executors.

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From the 25th March, 1834, down to the time when the testator executed the said will, he contemplated a marriage with *Ann Bakewell*, therein named. On the 21st February, 1835, he married *Ann Bakewell*, and lived with her up to the time of his death. He had been from the time of his marriage down to his death in a bad state of health, and on the 11th day of May, 1835, he was taken ill and died. At the time of his death he was seised in fee simple of all the premises mentioned in the declaration. The will was, a short time after his death, found in his bed-room, in an oak chest, of which he had kept the key, and *Elizabeth Stone*, the person who found the will, had been told by the testator, ten weeks before his death, where he had deposited it. On the 16th October, 1835, the wife of the said *John Fox* was delivered of the said *William John Fox*, one of the lessors of the plaintiff, who is the only son and heir at law of the testator. Of the lands of which the testator died seised, his widow would be entitled to dower, unless she was deprived of such dower by the operation of his will, or by operation of law. The testator, on the 20th November, 1834, had agreed to purchase a house for 690*l.*, for the purpose of residing in when married. In the draft conveyance sent to the testator for his perusal was inserted a declaration, that any wife, testator might take, should not be entitled to dower. The testator requested that such clause should be struck out. Upon its being explained to him, that as he was on the point of marriage, if, after he married, he wished to resell the property he could not do so without the consent of his wife, he said he was perfectly aware of that, that he did not intend to debar his wife of dower.



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On the 30th of September, in the year 1829, *Joseph Fox*, the brother of *John Fox*, entered into a written contract for the purchase of some property at Marston Montgomery, in the county of Derby, at the sum of 463*l.* 14*s.* 6*d.*, with *Thomas Harrison*, *John Wheatly*, *Thomas Carnell* and *Benjamin Carnell*, trustees under the will of *John Etches*, deceased. On the 28th day of March following, *John Fox* was let into possession of the said last-mentioned premises, but the titles not being then complete, it was agreed that he should receive the rents and profits from that period, and should pay interest to the said trustees on the amount of the purchase-money, until the purchase was completed. After this agreement, *John Fox*, in like manner, as the purchaser of the other parts of the same estate, which was sold in lots, was let into possession of the said property so contracted for by *Joseph Fox*, and let the same to *John Deaville*, who held the same as tenant, and paid rent half-yearly to *John Fox*, from the said 25th day of March, 1830, up to the time of his decease, some of which payments were made in the presence of his brother *Joseph*. No other contract than the one before mentioned to have been entered into by *Joseph Fox* with *Thomas Harrison*, *John Wheatly*, *Thomas Carnell* and *Benjamin Carnell*, was made for the last-mentioned property. On the 17th day of November, 1834, *Joseph Fox* died, unmarried and intestate, seised of considerable real estates in fee simple in possession, which thereupon descended to *John Fox*, as his only brother and heir at law, and *John Fox* was the sole next of kin of *Joseph Fox*, and was entitled to administration of the personal estate of which he died possessed. By deeds of lease and release, bearing date the 6th and 7th of March, 1835, the property at Marston Montgomery was conveyed by the said *John Wheatly*, *Thomas Carnell* and *Benjamin Carnell* (*Thomas Harrison* being then dead), as surviving trustees under *John Etches'* will, to *John Fox*, in consideration of 463*l.* 14*s.* 6*d.*, who thereupon paid the said purchase-money, and interest upon the same, from the 25th day of March, 1830. In the month of August, 1835, *John Deaville* paid half a year's rent, due

for the same premises on the 25th day of March preceding, to *John Hordern*, who was one of the executors of *John Fox*. The value of the real estate left by *John Fox* amounted to about 49,000*l*.

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At the trial, the plaintiff in error admitted the title of *William John Fox* as heir at law, but claimed as devisee under the will of January, 1835. He also put in evidence two previous wills of the testator, dated respectively the 25th March, 1834, and 1st December, 1834. By the former, *John Fox* gave to *Ann Bakewell* an annuity of 40*l*. a year, and devised all his real property, subject to this annuity, to his brother *Joseph Fox*. By the second will he gave certain lands and tenements to *Ann Bakewell* for life, remainder and all the rest and residue of his real property to the plaintiff in error. Objection was made to the reception of these wills in evidence, by the counsel for the defendant in error, but the learned baron received them, upon which the defendant in error tendered a bill of exceptions.

Bill of exceptions of the defendant in error (the heir.)

The evidence also given by the defendant in error as to the declarations by the testator, on the subject of his future wife's dower, on the conveyance of 20th November, 1834, as set out in the special verdict, was objected to on the part of the plaintiff in error, but received by the learned baron. The counsel for the defendant in error proved, that on the 30th September, 1829, *Joseph Fox*, the brother of the testator, entered into a contract with trustees under the will of one *Etches*, for the purchase of some property at Marston Montgomery, for the sum of 463*l*., and signed a contract for the purchase of several lots, as highest bidder at an auction, in his own name, as principal. On the 25th March following *John Fox* was let into possession of the premises, but the titles not being then completed, it was agreed that he should receive the rents and profits from that period, paying interest on the amount of the purchase-money. At the same time, *John Fox*, as purchaser of other lots of the same estate, was let into possession of the property so contracted for by *Joseph Fox*, and let it to a tenant, who paid

First exception to the receipt of previous wills by the testator in evidence.

Second exception to the declaration of testator as to his future wife's dower.

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Third excep-  
tion to the re-  
jection of evi-  
dence, that  
*J. F.* had  
bought certain  
property as  
agent for the  
testator.

Bill of excep-  
tions of the  
plaintiff in  
error (the  
devisee), to  
the rejection  
of the testa-  
tor's letters  
and declara-  
tions after his  
will.

him rent for it from the 25th March, 1830, to the time of his death, some of which payments were made in the presence of *Joseph Fox*. No other contract for the purchase of this property was made by *Joseph Fox* with *Etches'* trustees. On the 17th November, 1834, *Joseph Fox* died intestate, and his real estates descended upon *John Fox*, as his heir at law. By deeds of lease and release, the property at Marston Montgomery was conveyed by *Etches'* trustees to *John Fox*, in consideration of 463*l*. The counsel for the defendant in error then proposed to prove by parol evidence that *Joseph Fox* had bought this property as agent for the testator *John Fox*. This evidence was objected to on the part of the plaintiff in error, and rejected by the learned judge; upon which the counsel for the defendant in error also tendered a bill of exceptions.

The plaintiff in error, at the trial, after proving the will of January, 1834, the death of *Joseph Fox* in November, 1834, the subsequent will of December, 1834, and the will of January, 1835, tendered in evidence certain letters from the testator to the defendant, the first of which was dated January 19, 1835; the last, which was dated 29d February, 1835, announced his marriage two days previously with *Ann Bakewell*, and contained the following paragraph:—"Dear *William*, no act of mine shall prejudice the interest of relatives."—(All these letters contained expressions of warm interest and affection for the plaintiff in error.) Declarations of the testator were also tendered, made eight or ten days before his death, to the effect that he had made his will and that he would not alter it; that he had left the chief part of his property to the plaintiff in error; and that he had taken care that the *Bakewells* should not have any part of his property. Various other declarations of the testator were also tendered, to the effect that he did not intend his will to be altered; in one of which, about a month after his marriage, he stated that he felt very unwell; that his will was made, and that it was as it should be, for it never should be altered; and that he did not wish his marrying *Ann Bake-*

*well* to prejudice his friend *William Marston* at all. The counsel for the defendant in error objected to the reception of these letters and declarations, and the learned baron refused to receive them in evidence; upon which the plaintiff in error tendered a bill of exceptions.

An action of trover for title deeds, between the same parties, was also tried at the same assizes, upon which the same questions arose. This last-mentioned action having been brought in the Court of Exchequer, by consent of the parties, it was arranged that judgment should be given for the defendant in error, in the ejectment in the Queen's Bench, *pro forma*, and that the writ of error on the ejectment should be argued before all the judges, sitting as a Court of Error, from each Court.

The case was argued on June 13th, November 1st and November 27th, 1837, before Tindal C.J., Lord Abinger C.B., Park J., Littledale J., Vaughan J., Parke B., Bolland B., Bosanquet J., Alderson B., Patteson J., Gurney B., Williams J., Coleridge J., and Coltman J.

Sir *J. Campbell* A. G., for the plaintiff in error. It is proposed, first of all, to shew on the special verdict that the plaintiff in error (the devisee) is entitled to judgment; secondly, that on the bill of exceptions tendered by the defendant in error (the heir), there is no ground for admitting the evidence there rejected. If the Court shall decide in favour of the devisee on both these grounds, it will be unnecessary to argue the bill of exceptions for the rejection of evidence on the part of the devisee; that bill, therefore, will be considered last.

I. As it is clear that the will of *John Fox* conveys the estate to the devisee, unless it has been revoked, it is to be contended on the other side, that the subsequent marriage of *John Fox*, and the birth of a child, operate as an absolute revocation, either by a presumption of law, or by what is sometimes called a tacit condition annexed to the will, that it should be void on such an event. There is no doubt that

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marriage and the birth of a child may revoke a will, as was decided very early with regard to personal property in *Overbury v. Overbury* (a), and as to real property, in 1771, by *Christopher v. Christopher* (b). But no rule of law decides that in all such cases there is an absolute and unambiguous revocation. The revocation proceeds upon a supposed intention of the testator, that on so great a change of circumstances ensuing in his family, his former will was not to stand; but this supposed change of intention, like all matters *in pais*, may be rebutted by evidence. In each case the Court will look *aliunde* to see what the circumstances of the testator were. If a testator, on making a will, were to declare that it should stand good, notwithstanding his ensuing marriage and the birth of a child, no ground could be alleged for presuming an intention to revoke, even though he should leave his wife and child totally unprovided for. Again, if it appeared on the face of the will that he contemplated marriage (and the strongest proof of that would be, that in the will he provided for his subsequent wife), the subsequent marriage would not be a revocation. Or if by a separate instrument he make any provision for his wife and child, the subsequent marriage and issue are no revocation. It is clear, therefore, by all these cases, that the revocation, in every instance, proceeds upon the intention of the testator, which, therefore, must be ascertained by extrinsic evidence. This will appear clearly by examining the cases in the order they have been decided. In *Overbury v. Overbury* (a), which is the first case on the subject, it was held, that marriage and the birth of a child revoked a previous will, for that, according to the rule of the civil law, it was *testamentum inofficiosum*. This rule is inaccurately cited from the civil law, for the *testamentum inofficiosum* was, when any child was unprovided for by the will, without just cause assigned (c), which is a rule the law of England has never ad-

(a) Mich. 34 Car. 2; 2 Show.  
 242.

(b) 2 Dicken, 445.

(c) See Inst. lib. 2, tit. 13.

mitted. In the next case, *Lugg v. Lugg* (a), where the same point is decided, the grounds of decision are also given, which are very important, viz. that marriage and the birth of a child amounted to a revocation, but that it was a presumption only, and therefore if, by any expression, or any other means, it had appeared that the intent of A. (the testator) was that the will should stand in force, the marriage could not have been a revocation. This decision is of the highest authority, for, although it was given on an appeal from the sentence of the Ecclesiastical Court, by the Court of Delegates, that great common lawyer, *Treby* C. J. was one of the Delegates. In *Christopher v. Christopher* (b) the Court of Exchequer extended the rule to real property, although the inconveniencies of the doctrine were forcibly pointed out by *Perrot* B., who dissented from the decision. In the next case, in 1779, *Spraage v. Stone* (c), the general point was also decided, that marriage and the birth of a child (nothing more being shewn) revoked a previous devise of lands; which shews that a presumption in law arises under such circumstances, but not a *presumptio juris et de jure*. For, in *Brown v. Thompson* (d), where T. S., who was a bachelor, made a will and left 500*l.* to his brother, and devised his real estate to *Elizabeth Close* and her heirs, and afterwards married her, and then died leaving her *privement ensient* with a son, without having altered his will, Sir T. Trevor M. R. ruled that the will was revoked; but on appeal, the Lord Keeper *Wright*, after recognising the principle, that the birth of issue (or, as he termed it, alteration of circumstances,) might revoke a will, held, that there was no such alteration in that case, and he established the will. The lord keeper expressly noticed the fact of the testator having provided for his future wife as the ground of his decision. The next case was *Thompson v. Sheppard* (e),

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(a) 1 *Ld. Raym.* 441; *S. C.* 2 *Salk.* 592.

(b) 2 *Dick.* 445.

(c) *Ambl.* 721; cited in argu-

ment, *Brady v. Cubitt*, 1 *Dougl.* 31.

(d) 1 *Eq. Cas. Abr.* 413; *S. C.* 1 *P. Wms.* 304, n.

(e) 1 *Ves. & Bea.* 394, n.

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decided in 1779, where *W. M.*, being a widower, and having several children, made a will, devising his estate in trust for his children. He afterwards married again, and had other children, and the Ecclesiastical Court held, that his will was not revoked. The decision was appealed against, but was afterwards compromised. *Sheath v. York* (a) is a decision to the same effect; and Sir *W. Grant* M. R. there laid down, that what shall be deemed a total change in the testator's circumstances may be a matter of controversy in each new case. The next case, *Brady v. Cubitt* (b), is an authority for the devisee on almost all the points. In that case the testator, who was a widower without children, devised a portion only of his lands to his own right heirs, and afterwards married, having, previously to his marriage, settled a jointure on his wife out of an estate not devised. The testator had a daughter by this marriage, and after her birth he made several statements as to his intention that his former will should stand, which were received in evidence. The Court of King's Bench held that the will was not revoked, and Lord *Mansfield* C. J. founded his judgment on the grounds that the testamentary disposition was not of the whole estate, but more especially because the presumption arising from marriage and the birth of a child, *like all others, may be rebutted by every kind of evidence*. The grounds on which Lord *Mansfield* C. J. held that the presumption was rebutted, are exactly similar to those in the present case, viz. the declarations of the testator, and the fact of the whole estate not being disposed of. His lordship said, "there is no case in which marriage and the birth of a child have been held to raise an implied revocation where there has not been a disposition of the whole estate," and the whole Court of King's Bench was unanimous in their decision. In the present case also, the whole estate is not disposed of by the will. The next case is *Doe v. Lancashire* (c), in which parol evidence was tendered, not to shew the inten-

(a) 1 Ves. & Bea. 390.

(c) 5 T. R. 49.

(b) 1 Doug. 31.

tion of the testator that his will should stand, but that the will was revoked; and it was very properly rejected; for, if parol testimony to revoke a will were admitted, it would be to repeal the Statute of Frauds, which enacts (29 Car. 2, c. 3, s. 6,) that the revocation of a devise of land shall be only by some one of the *acts* therein specified, or by writing (a). This case is sometimes erroneously cited as an authority to shew that evidence is not admissible to prove the intention of the testator, and to rebut the implied presumption arising out of marriage and the birth of issue, but it clearly proceeds only on the distinction above pointed out, and was not intended to impugn *Brady v. Cubitt* (b). *Buller J.* was a member of the Court in both cases, and agreed with each decision; and also in *Goodtitle v. Otway* (c), which is relied on by the other side, and in which *Buller J.* explained the grounds of the decision in *Brady v. Cubitt* (b), and supported them. The next case is *Ex parte the Earl of Ilchester* (d), where it was held that marriage and the birth of children (the wife and children being provided for by settlement) formed another exception to the rule as to the revocation of a former will. In this case the testator had left his estate to his children by a former marriage, and the children by the second would have been totally unprovided for except for a provision in a separate instrument; and the ground of that decision, as is shewn by

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(a) By that statute it is enacted, "that no devise in writing of lands, tenements or hereditaments, nor any clause thereof, shall be revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force until the same be burnt, cancelled, torn,

or obliterated by the testator, or his directions in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the deviser, signed in the presence of three or four witnesses, declaring the same, any former law or usage to the contrary notwithstanding."

(b) 1 Doug. 31.

(c) 2 H. Bl. 522; S.C. 3 Ves. jun. 650; 1 B. & P. 576; and 7 T. R. 399.

(d) 7 Ves. jun. 348.



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Sir J. Nicholl in *Johnston v. Johnston* (a), is not that the children by the second marriage were provided for, but that the Court had inquired into the circumstances to see what the intention of the testator was, and decided the case according to that intention. *Kenebel v. Scrafton* (b) is another very strong case in favour of the devisee. The Court held there, that where the wife and children are provided for by the will, as it is impossible to say that the testator did not, when he made his will, contemplate such a change in his circumstances as his subsequent marriage would cause, the will remains unrevoked. Lord *Ellenborough* C. J. said, that the rule as to revocation was allowed on all hands only to apply where the wife and children were *wholly* unprovided for. Evidence of the declarations of the testator, a few minutes before his death, was received in that case. It is, therefore, another authority to shew that the presumption may be rebutted by any sort of evidence, that the contemplation of marriage is a circumstance to rebut it, and that that, joined with a provision for the wife and children, conclusively rebut it. *Johnston v. Wells* (c) is another authority on this point. In that case there was a second marriage and the birth of issue, but as the second wife had some real property settled on her and her issue by her father's will, the Court held, that the will was not revoked. *Talbot v. Talbot* (d) is another decision of the Ecclesiastical Court, and is decisive on the point, that although the issue by the second marriage are left totally unprovided for by the will, the will is not revoked if the circumstances are such that the intention of the testator to revoke cannot be presumed. It may be observed, that as these decisions of the Ecclesiastical Courts have not proceeded upon any distinctions in law between a will of real and of personal estate, but upon principles common to both, they are as good authorities as decisions at common law, for all the positions they contain; and it is

(a) 1 Phill. Ecc. R. 447.

(b) 2 East, 530.

(c) 2 Hagg. Ecc. R. 561.

(d) 1 Hagg. Ecc. R. 705.

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submitted that they are unanimous in accordance with the decisions of the Courts at Westminster, in *Brady v. Cubbitt* (a), *Kenbel v. Scrafton* (b), and *Ex parte Ilchester* (c), that evidence is admissible to rebut the presumption implied by law, when marriage and the birth of a child take place after a will. The question then in this case is, are there any facts to rebut the presumption of marriage? It is clear there are abundant. First of all, it is found that the testator contemplated marriage: if he contemplated marriage, he must have contemplated the possibility of issue; and as he made his will under such circumstances, it follows that he did not intend the will to be revoked upon that occurrence. Suppose the will had been made the morning of his marriage, could it be contended that his marriage an hour or two after would revoke it? If not, where is the line to be drawn? [*Parke* B. Contemplation of marriage is a very vague expression. *Lord Abinger* C. B. 'The testator devises to *Ann Bakewell* for so long as she shall remain sole and unmarried. According to the terms of the devise, it is defeated by her marriage.] The will being ambulatory till the testator's death, he meant, no doubt, that if she married any one after his death, the estate should go over. He could not defeat the devise by marrying her himself. The terms of the devise were intended to provide that she should not take any estate if she married any one else than the testator during his lifetime. To contemplate marriage is an accurate legal expression, and, like contemplation of bankruptcy, it means that the party is about to do all that in him lies to bring on the event. The next fact is, that on the purchase of a house for 690*l.* the testator ordered a clause to be struck out, barring his future wife of dower, stating that he did not intend to debar his wife of dower. [*Alderson* B. His wife could not be entitled, for she would be barred by the will under the late act, 3 & 4 *Will.* 4, c. 103.] It is submitted that that act does not apply, as she was not his wife at the time of making the will. The special verdict finds

(a) 1 Doug. 31.

(c) 7 Ves. jun. 348.

(b) 2 East, 530.

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that the testator's widow is dowable of his real estates, unless barred by the statute. Sect. 4, of 3 & 4 *Will.* 4, c. 105, enacts that no widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his life-time, or by his will. Sect. 5 provides that all partial estates, or interests created by any disposition or will of a husband, shall be valid as against the widow's right to dower. It is therefore submitted to be clear that that statute only applies to wills made during coverture. [Lord Abinger C.B. Was not this the will of the husband?] No; the will speaks from the time of making. It only operates on lands held at that time. Any subsequent change of estate in the testator would revoke the will. It is clear therefore the will cannot be considered the will of the testator as husband. The statute was intended to extend the dowability of women, and dower has always been a favourite of the law. It is submitted therefore that the wife was dowable of all the real estates of which the testator died seised; and therefore being amply provided for, she comes within the rule laid down by Lord Mansfield C. J., in *Brady v. Cubitt* (a). She also may be considered to be provided for by the will in another mode; for as by the new act relating to dower, 3 & 4 *Will.* 4, c. 105, the husband is enabled to alienate the whole of his real property, and as he chose to allow his old will to stand, by which she would take dower, he may be considered to have died intestate as to one-third of his property purposely, in order to provide for her. [Tindal C. J. That would have been so before that act also, for the law would have given her one-third.] That is by act of law; but this must be considered the voluntary act of the testator, as he had the power to bar dower. [Lord Abinger C. B. No case goes the length of saying that marriage alone revokes a will?] No; at common law there must also be the birth of a child; although in the Spiritual Court Sir J. Nicholl, in *Johnston v. Johnston* (b), held that the birth of a child only is sufficient.

But the child also is provided for in this case. It is

(a) 1 Doug. 31.

(b) 1 Phill. Ecc. R. 447.

found, by the special verdict, that on the 30th September, 1829, *Joseph Fox* entered into a contract for the purchase of some property for 463*l.*, and that *John Fox* was let into possession. It is admitted that if *John Fox* had an equitable interest in this estate, it would pass under the will. But there is nothing found by the special verdict on which the Court can infer that *John Fox* had any estate whatever; he was a mere occupant. Therefore as to this property he died intestate, and it descends upon the heir at law. [*Alderson B.* If the fee was not in *John Fox*, it was in *Joseph Fox*, who died before the making the testator's will, leaving him his heir at law. It would therefore pass with the rest of the property to the devisee.] *Joseph Fox* was not seised in fee, either in law or equity. He might have had an equitable claim upon the vendors to compel them to convey to him upon paying the purchase-money. Till the actual conveyance in March, 1835, there was a mere agreement *in fieri*. It is true that it is laid down in *Sugd. Vend. & Purch.* 171, (9th ed.) that "equity looks upon things agreed to be done as already done;" but this is only the opinion of a text writer. The son therefore, as well as the mother, is provided for; and the Court will not enter into a question of *quantum*. [*Lord Abinger C. B.* Admitting that the Court will, under certain circumstances, presume a revocation to be rebutted by the intention of the testator, must not the fact of the intention be found by the jury? We have nothing before us but the special verdict, and no fact as to intention found.] All the cases on this subject have been disposed of by the Court. In *Brady v. Cubitt (a)*, as in this case, there was a special verdict. On the facts, as found by the special verdict, there is enough to warrant the Court in deciding that the testator did not intend to revoke his will. The revocation relied upon by the defendant in error is a revocation in law, or otherwise it would be void by the Statute of Frauds. It might have been thought that after the express words of that statute (*b*) no revocation of a will could exist, except by one of the

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(a) 1 Doug. 31.  
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(b) See note (a), *ante*, p. 513.  
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modes there pointed out. Revocations by law, however, having been held still to exist, as was pointed out by *Eyre C. J.* in *Goodtitle v. Otway* (a), the decision in *Christopher v. Christopher* (b) extended revocations in law to the case of marriage and the birth of issue. But as the facts on which that revocation is founded are only to be learnt by extrinsic evidence, viz. as to the circumstances by which the testator was surrounded, extrinsic evidence is also receivable to shew that those facts were not intended to have that effect. The difficulties foreseen by *Perrot B.*, in *Christopher v. Christopher* (b), as consequent on the decision of marriage and birth of a child operating as a revocation, have driven the Courts to adopt the expression of its being a tacit condition annexed to the will, instead of a presumption of law: *Doe v. Lancashire* (c), *Goodtitle v. Otway* (d). But if it be a tacit condition, what is the condition? It is not that the will shall be revoked on marriage and the birth of issue; for if the whole estate be not disposed of, it is not revoked; nor if the will make any provision for the wife and children; and so also if provision is made for them in a separate instrument, the will is not revoked. If then the condition have so many limitations, what difficulty is there in construing it to be that the will shall not be revoked, if such was the express intention of the testator?

II. Supposing then that judgment ought to be given for the devisee on the special verdict, is there anything in the bill of exceptions, tendered by the heir, to deprive him of it? The first exception objects to the receiving in evidence of two previous wills, made by the testator in March and in December, 1834. But if these wills are receivable for any imaginary purpose, the bill of exceptions must fail, as it excepts to them generally, not as to the application of them. The distinction the learned baron drew as to his receipt of declarations, &c. was this, that he would admit those only that were made before the will. [*Parke B.* The previous wills might be evidence for the point which has been re-

(a) 1 H. Bl. 517.

(c) 5 T. R. 49.

(b) 2 Dicken, 445.

(d) 7 T. R. 399.

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cently so much discussed here in *Wright v. Tatham* (a), viz. as to the capability of the testator.] Clearly, and for many other purposes. The same observation applies to the second exception as to his declarations relating to his future wife's dower; for those also are excepted to generally. The third exception of the plaintiff in error is to the rejection of the parol evidence relating to the purchase by *Joseph Fox* of the property at Marston Montgomery; but it is submitted that it was rightly rejected. The substance of the evidence was to shew that *Joseph Fox*, who had entered into a written contract for the land, had entered into it on the part of his brother, *John Fox*. This is an attempt to raise a trust by parol, and defeat the Statute of Frauds. It was therefore properly rejected. For some purposes, no doubt an agent may be created by parol; but it was *Joseph* alone who could have compelled specific performance, and agency would not constitute him a trustee for *John*. The parol evidence tendered, in fact, contradicts the written contract, in which *Joseph* purchased in his own name, and is therefore inadmissible. [*Parke* B. Does the doctrine arising from the Statute of Frauds apply to executory agreements at all? Would it not be competent for *John Fox* to shew that the agreement was entered into by *Joseph* on his behalf? *Tindal* C. J. Take the case of an auctioneer;—Could it not be shewn, on his signing an agreement as in his own name, that it was really on behalf of his principal?] On *Joseph* entering into the agreement, the beneficial interest vested in him; and therefore to make him out a trustee by parol would be to defeat the Statute of Frauds.

Lastly, on the bill of exceptions tendered for the devisee. It is submitted that the letters and declarations of the testator were admissible, although they were subsequent to the making his will: for the inquiry being what the intention of the testator was, all evidence was admissible that threw any light on that point. This point therefore falls under

(a) *Ante*, p. 305.

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the general question argued on the special verdict. Suppose marriage and the birth to be a revocation of the will by presumption of law, it is a presumption founded on the intention of the testator; and direct evidence from the testator's own mouth, of what his intention was, must be admissible. Or let it be taken as a tacit condition annexed to the making the will. The condition is not that marriage and the birth of a child shall per se revoke the will; for if the child is provided for, or if the whole estate be not disposed of, or if there be children by a previous marriage, there is no revocation. What difficulty then can there be in moulding the condition according to the facts, viz. that there is no revocation if the testator expressly declare there should not be. If this be part of the condition, the evidence is admissible. There is no statute law to define what shall or shall not be a revocation in law. The whole law on the subject is founded on decisions; and therefore the only rule that can be relied upon is that which is based on principle. The authorities are decidedly in favour of admitting this evidence. In *Lugg v. Lugg* (a), any expression that may have fallen from the testator is referred to as sufficient to outweigh the presumption arising from marriage, &c. In *Calder v. Calder*, cited in *Johnston v. Johnston* (b), the same reliance is placed on such evidence. [*Alderson B.* Suppose marriage and the birth of a child; and the husband, having made a previous will, should intend to revoke it,—it would be revoked, no doubt; but if after that he were to change his intention, would it be again set up?] If a declaration be shewn that the will should not be revoked, that is sufficient; for that shews the will never had been revoked. [*Alderson B.* But suppose the testator first of all declared that the will should not stand, and afterwards that it should; if you contend that parol testimony is inadmissible to revoke the will, how can it be admissible on the other side?] The revocation proceeds from the acts of the testator, and the parol evidence may be admissible to explain those acts. It

(a) 1 Ld. Raym. 441; S. C.  
 2 Salk. 592.

(b) 1 Phil. Ecc. R. 472.

has been said that the will is not absolutely revoked, only presumptively; and that perhaps is the right solution of the difficulty; *Gibbens v. Cross* (a). In *Brady v. Cubitt* (b) letters were admitted. In *Kenebel v. Scrafton* (c) parol testimony was given: it is true that expressions are attributed to Lord *Rosslyn C.* on sending the case to an issue, reprobating such evidence, and stating that a Court of Law would pay no regard to it (d); but what falls from an equity judge, as to what would be the practice of the Courts of Law, is not entitled to very much weight. On the other hand, in *Pole v. Lord Somers* (e), Lord *Eldon C.*, in alluding to the parol evidence admitted in *Brady v. Cubitt* (b), found fault indeed with the language attributed to Lord *Mansfield C.J.*, but seems to have thought the evidence rightly admitted to get the better of a presumption. The Attorney-General then read the decision of Sir *Herbert Jenner* on the present will, in the Consistory Court, in which that learned judge admitted the evidence to rebut the revocation; and contended, that on this point there was no distinction between wills of land and personalty.

Sir *W. W. Follett*, *contra*, (for the heir.) It being conceded that the cases have established the rule, that marriage and the birth of a child operate as a revocation of a previous will, the question is, whether there are any circumstances in this case to take it out of the rule. The principle which the learned baron laid down at the trial as to the reception of evidence, with regard to those circumstances, was, that he would admit evidence of acts done before the making the will, but not after. However correct that rule may be, it will be seen that it was not rightly applied. For the two previous wills of the testator are nothing but declarations of what his intentions were, and should have been rejected on the same principle that other declarations as to his intentions were afterwards rejected. It is impossible to see how declarations of a testator can be evidence on the

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(a) 2 Add. Ecc. R. 455.

(b) 1 Dougl. 31.

(c) 2 East, 530.

(d) 5 Ves. jun. 663.

(e) 6 Ves. jun. 326.



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point whether a subsequent marriage and the birth of a child should revoke his will, when the birth of the child could not be known to him.

The circumstances mainly relied on by the other side are, that the testator has provided for his widow by his will, and also by the dower she is entitled to, and that the son is provided for as heir to the estate purchased for 463*l*. As to the devise to *Ann Bakewell*, it is very doubtful whether she could take under it at all, the testator probably meant that no one else should marry her, but if he married her himself he did not intend that that should be her provision after his death: but whatever he meant she does not answer the terms of the devise. As to the son, even if that estate should descend upon him, it does not affect the question, as appears by the decision in *Christopher v. Christopher* (a). *Adams B.* said there "the circumstances of the testator are to be considered; when he was without a child he had left his estate to his nearest relation, his brother; but when he had a child it became dependent on him for support; moral duty and natural love called on him to give it a preference to every body." But on what ground is it contended this estate passes to the heir? *Joseph Fox* either bought this estate as agent or as principal. If he bought it as principal, then it descended upon *John Fox* at his brother *Joseph's* death, on 17 Nov. 1834; and it passed under his will dated 17 Jan. 1835. If *Joseph Fox* bought as agent for *John Fox*, then as an agent may be created by parol, it was competent to prove this agency by parol testimony; the learned baron therefore was wrong in rejecting the evidence which would have proved the son to be totally unprovided for. All the cases shew that the ground on which marriage and the birth of a child operate as a revocation, rests on the implied duty which is held to exist in every man to provide for his children. In *Gibbens v. Cross* (b) it is pointed out that the rule is borrowed from the civil law, where the birth of a child alone would revoke a will, as was also held in *Johnston v. Johnston* (c); but (a) 2 Dicken, 445. (b) 2 Add. Ecc. R. 455. (c) 1 Phill. Ecc. R. 447.

throughout all that class of cases where it has been held that marriage and the birth of issue have been held not to operate a revocation, it will be found that in every one of them the wife and children were fully provided for.

In *Brown v. Thompson* (a) the testator devised to *Elizabeth Close*, whom he afterwards married, in fee; unless therefore she devised away from her own son, he would take as heir. In *Johnston v. Johnston* (b) Sir *J. Nicholl*, speaking of *Brown v. Thompson* (a), says "the will was not revoked by the subsequent marriage and birth of issue, upon the ground that the will made a provision for the wife, and through her for the son." *Kenebel v. Scrafton* (c) proceeds on the fact of the wife and issue being fully provided for. So also does *Ex parte Ilchester* (d). Where male issue exist of a prior marriage, it would seem that the question of revocation could not arise.

For suppose a man marries and has a son, and then his wife dies, and he makes a will, if he subsequently marries and has issue, there would be no revocation of his will, because that would not benefit the issue of the second marriage, as the real estate would all descend on the eldest son, which shews that the interests of children are the foundation of the rule; *Sheath v. York* (e). So in *Tulbot v. Talbot* (f) there was no revocation, because there was a settlement fully providing for the wife and children. In *Johnson v. Wells* (g) the testator had married twice, and had issue by both marriages, and the second wife had some real property settled on her and her issue by the marriage. The case on which the other side mainly depends is *Brady v. Cubitt* (h), but that decision has been very much misunderstood; for although it is true that Lord *Mansfield* said the presumption might be rebutted by any sort of evidence, in that case no such evidence was offered, and the case is supportable on perfectly distinct grounds. If what fell

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(a) 1 Eq. Ca. Abr. 413; S. C.

1 P. Wms. 304, n.

(b) 1 Phill. Ecc. R. 470.

(c) 2 East, 530.

(d) 7 Ves. 348.

(e) 1 Ves. & Bea. 390.

(f) 1 Hagg. Ec. R. 706.

(g) 2 Hagg. Ec. R. 561.

(h) 1 Dougl. 31.

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from Lord *Mansfield* be sound law, it would make the revocation depend upon the intention of the testator; the intention would be a matter *in pais* to be decided, like all such, by a jury, and the Statute of Frauds would be directly repealed. For the only revocations, in fact, allowed by that statute are specified, and this is not one of them. It is the difficulties arising from this doctrine that has brought upon *Brady v. Cubitt* (a) the animadversions of the Court in *Goodtitle v. Otway* (b), *Kenebel v. Scrafton* (c), and that caused Lord *Kenyon*, in *Doe v. Lancashire* (d), to put the revocation not upon the ground of presumption, but of a tacit condition. In no case has the question of intention been laid before a jury, which shews that it can have nothing to do with revocation or no revocation. The argument and Lord *Hardwick's* judgment in *Parsons v. Freeman* (e) completely prove this. It is not necessary to lay down that marriage and the birth of issue revoke a will as a tacit condition, they may be more properly stated to operate a revocation by a rule of law, just as the change of estate operates a revocation by rule of law. In *Goodtitle v. Otway* (b) there is no doubt that the testator did not intend that his will should be revoked by the recovery suffered, but the Court most properly held that no evidence of his intention could be given; and *Eyre C. J.* pointed out in his judgment, that the revocations in law which still existed, notwithstanding the Statute of Frauds, were questions entirely for the Court, without reference to the intention of the testator. *Buller J.* there endeavoured to support his decision in *Brady v. Cubitt* (a), although he agreed with the rest of the Court in *Goodtitle v. Otway* (b). He said, "there is a great difference between cases which depend on circumstances and those which depend on the solemn acts done by the party himself, and this distinction supports the case of *Brady v. Cubitt* (a)." But this distinction really makes against that case, for if the revocation is to depend upon an act done by the testator, it might be fair that evidence

(a) 1 Dougl. 31.

(b) 2 H. Bl. 516.

(c) 2 East, 580.

(d) 5 T. R. 49.

(e) 3 Atk. 741.

should be received *quo animo* the act was done. Then where is the distinction between *Goodtitle v. Otway* (a) and the present case? In *Doe v. Lancashire* (b), where evidence was tendered as to the intention of the testator, the Court laid no stress upon it, and *Buller J.* himself said, that it was a revocation in law, and that no regard was to be paid to it. Lord *Hardwicke*, in *Martin v. Savage* (c), held that parol evidence of intention should not be admitted, as it would elude the Statute of Frauds; and *Serjt. Williams*, in his note to *Duppa v. Mayo* (d), shews that if subsequent marriage and the birth of a child revoke a will by operation of law, the same objection exists to receiving parol evidence as in other revocations of law. In *Kenebel v. Scrafton* (e), where evidence of intention was given, the Court studiously avoided forming any judgment upon it; and Lord *Rosslyn C.*, in sending the case down as an issue, observed, that a Court of Law would pay no attention to it. On principle what can be the value of evidence of intention, unless it is embodied in an act. Suppose an unmarried woman makes a will and then marries, there is a revocation, not in any of the modes enacted by the Statute of Frauds, but by the operation of law. Her *status* is altered, which is sufficient; then, suppose her husband were to die, no declarations of her's could set up the will. Take the case of a surrender by operation of law, for instance, where a second lease is granted to the lessee, could the intention of the parties be given in evidence that it was not to operate as a surrender of the first lease? All these cases are collected in the notes to *Duppa v. Mayo* (d). The only case raising any doubt is *Brady v. Cubitt* (f), as is observed by *Serjt. Williams*; but it is evident that case cannot be good law on this point, because it would admit of a revocation *in pais*, not sanctioned by the Statute of Frauds. [*Patteson J.* Even in these cases where an imperfect conveyance, such as a feoffment without livery &c., has been held to operate a revocation, and in which the intention of the testator

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(a) 2 H. Bl. 516.

(d) 1 Wm. Saund. 278, (n. 4.)

(b) 5 T. R. 42.

(e) 2 East, 530.

(c) Cited 1 Ves. sen. 440, 489.

(f) 1 Dougl. 31.

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must be the ground of the decisions, still evidence of the testator's intention would be inadmissible, as appears from the notes to *Duppa v. Mayo (a)*.] Nothing can be stronger in favour of the present case.

The decisions in the Ecclesiastical Court have been referred to, but the marked distinction between the wills of real and personal property makes them inapplicable. No case on a will is decided in those Courts without receiving the testamentary declarations of a testator, for which evidence of his intention is often most material. But on what principle are they received? Because it is not necessary that a will of personalty should be either written or signed by the testator. All that is required by the Statute of Frauds (29 Car. 2, c. 3, s. 6,) is, that it should be *adopted* by him; therefore on the *factum* of propounding the will it is most essential to prove the intention of the testator. So also with regard to the revocation or republication of a will of personalty, neither writing nor the signature of the testator are required. S. 22, which requires the republication to be in writing, does not require the writing to be that of the testator. Therefore the declaration of a testator may make a will, or may revoke it, or may republish it. A will therefore may be set up in those Courts by mere parol declarations. But in a will of lands there can neither be revocation nor republication, without the signature of testator and three witnesses. The distinction, therefore, is broad and clear between the rule as to evidence in the different Courts; and it is unnecessary to examine the decisions in *Emerson v. Bovile (b)*, *Johnston v. Johnston (c)*, *Wakefield v. Cross (d)*, *Lugg v. Lugg (e)*.

The result of all the cases is, that the revocation of a will of lands by marriage and the birth of a child takes place in respect of a rule of law, and no evidence is receivable either on one side or the other. The different questions, therefore, all resolve themselves into this: if it was to be held that

(a) 1 Wm. Saund. 278, (n. 4.)

(d) 2 Add. Ec. R. 455.

(b) 1 Phill. Ecc. R. 342.

(e) 1 Lord Raym. 441; S. C.

(c) 1 Phill. Ecc. R. 447.

2 Salk. 592.

the revocation depends upon the intention of the testator, it would admit of a revocation *in pais* in a mode not sanctioned by the Statute of Frauds. In no case has the revocation ever been left to a jury as a question of fact. No evidence of such intention can be submitted to a jury, and without such evidence, unless the former decisions are overruled, the Court must hold that the will has been revoked in the present case.

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Sir *J. Campbell A. G.* in reply. As the devisee is clearly entitled under the will of the testator, and that will has not been revoked by any of the modes authorized by the Statute of Frauds, the burden is upon the other side to shew some authority to entitle the heir to succeed. The inconveniences arising from the unfortunate decision of *Christopher v. Christopher (a)*, and which were clearly foreseen by *Perrot B.*, have driven the other side to repudiate the terms *presumption* and *tacit condition* as descriptive of the revocation caused by marriage and the birth of issue. It is now said to be a rule of law. It is alleged, that by the law of England a man lies under the imperative duty of providing for his widow and his children. This is denied. The law in this country, ever since the Statute of Wills, (32 *Hen.* 8, c. 1,) gives every man full testamentary power over his property. The only guide which the Courts follow in construing a will is the intention of the testator. The rule introduced in the Ecclesiastical Courts, of considering marriage and the birth of a child a revocation of a will, has proceeded entirely on the ground of such being the supposed intention of the testator, as appears by *Lugg v. Lugg (b)*. In no case has it been put upon the implied duty of a father to provide for his children. In some of the cases the children were quite unprovided for; for instance, in *Brown v. Thompson (c)*, where the testator devised to *Elizabeth Close* in fee, leaving it in her power to carry the estate to a second husband, or to dispose of it as she pleased. If marriage and the birth of issue be a revo-

(a) *Dick*. 445.

(c) 1 *Eq. Ca. Abr.* 419; *S. C.*

(b) 1 *Lord Raym.* 441; 2 *Salk.* 1 *P. Wms.* 304, n. 592.

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cation by rule of law, there must be a rule capable of clear definition, it must be inflexible, and of universal application. The cases shew that no such characters apply to it, whereas if it be referred to its proper foundation, viz. the intention of the testator in each case, all difficulties vanish. If it be a tacit condition, it is not to be held necessarily annexed to the will at the time of making it. It is a condition created by law, according to the intention of the testator. The subsequent declarations of the testator, therefore, are admissible to shew what his intentions were at the time. This view gets rid of the difficulty as to contradictory declarations, for it may be left to the jury to determine what the intentions were at the time of making the will. Lastly, if the revocation be only a presumption, evidence of course is admissible to rebut it.

It is not contended that the question of revocation or no revocation is for the jury; but, like all questions of law, the facts raising it must first be found by the jury. Both sides agree that certain facts must be found. First, marriage; secondly, the birth of issue; third, whether any provision or not for the wife and children by settlement, will, or otherwise. Can it be alleged by any one having in view the *Berkeley Peerage* case, the *Douglas* case, and others, that the facts of marriage, and the birth of a child, are simple matters of fact, on which none of the frauds and perjuries contemplated by the Statute of Frauds are likely to occur? And if this be so, how are the difficulties increased, what violation of principle is there in inquiring also what the intention of the testator was?

The three cases on which the other side must rely are, *Christopher v. Christopher* (a), *Spraage v. Stone* (b), and *Doe v. Lancashire* (c); but in all those cases where marriage and the birth of issue were held to revoke the will, the testator had not contemplated marriage, and he left children unprovided for. Whereas in *Brown v. Thompson* (d), *Brady*

(a) Dick. 445.

(b) Ambl. 721.

(c) 5 T. R. 49.

(d) 1 Eq. Ca. Abr. 413.

*v. Cubitt (a)*, *Ex parte Lord Ilchester (b)*, *Sheath v. York (c)*, *Kenebel v. Scrafton (d)*, the will was not held to be revoked, because either subsequent marriage was contemplated, or no change in the intention of the testator could be presumed. *Talbot v. Talbot (e)*, *Johnson v. Wells (f)*, and the other decisions in the Ecclesiastical Courts, are *in pari materiâ*, for they all proceed on the same grounds, viz. that if the testator has provided for the issue of the second marriage, if the whole estate were not devised, or if in any other way the intention of the testator could be discovered, there is no revocation. The distinction drawn to avoid the effect of the ecclesiastical decisions does not apply, because the Statute of Frauds does not come in question on a revocation in law of a will of personalty, any more than of a will of real property. If there had been a question of republication the argument would have been correct.

As to *Goodtitle v. Otway (g)* and that class of cases, their authority is fully recognized; no doubt where a will has once been revoked, parol evidence is inadmissible to shew that the intention was not to revoke; but to make that case apply, it ought to be shewn that marriage and the birth of a child operate to revoke a will, with the same constant unanswerable effect as a change in the testator's estate. Here it is submitted that the will never has been revoked. *Brady v. Cubitt (a)* has been commented upon, and has been alleged to have been attacked more than it deserves, for that no parol evidence was given there. But the case is found in a very accurate reporter, and his marginal note is, that the implied revocation of a will by marriage, &c. may be rebutted by parol evidence.

The question there was between the heir and the devisees, and to shew that the will was not revoked the latter gave in evidence written statements by the testator of his intention that his devise should take effect.

It is true that Lord *Alvanley* M. R. expressed his dis-

(a) 1 Dougl. 31.

(b) 7 Ves. jun. 348.

(c) 1 Ves. & Bea. 390.

(d) 2 East, 530.

(e) 1 Hagg. Ec. R. 705.

(f) 2 Hagg. 561.

(g) 2 H. Bl. 522; 7 T. R. 399.

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approbation of *Brady v. Cubitt* (a), but he did not deny that it was law. In *Kenebel v. Scrafton* (b) also, parol evidence was given of the testator's intention; and although it is true that Lord *Kenyon* did not rest much weight upon it, the reason was, that the judgment of the Court passed upon another distinct ground. But when the question turns on the intention of the testator, then such parol evidence is most material; and in no case has any such evidence been rejected. With regard to *Martin v. Savage* (c), and that class of cases, when a testator has parted with his estate, and takes, by a conveyance, a different estate, the non-operation of the will is referable to the doctrine of ademption, rather than of revocation. The subject-matter of devise on which the will was to operate is gone.

With regard to the bills of exceptions, it seems almost admitted that the prior wills of the testator were admissible. The title being *primâ facie* in the heir at law, the proof of each will respectively took the title out of him, and no objection could be made at the time to the proof of any one of them. The declarations also of the testator with regard to dower were admissible, as they explained his acts with regard to the conveyance to himself of that particular property. With respect to the parol evidence of *Joseph Fox* having purchased the estate at Marston Montgomery, as trustee for *John Fox*, it is submitted to be contrary to the Statute of Frauds, (29 Car. 2, c. 3, s. 6,) to admit it. [*Parke B. Wilson v. Hart* (d) shews that it is competent to prove agency by parol.] If the question is fully considered, it is submitted that it cannot be permitted to shew by parol that a party holding in his own name is a trustee for another. But if the evidence should be admitted, it would only carry the property at Marston Montgomery with the other estates. The facts would still be left of the testator having contemplated marriage, and his having fully provided for his future wife, which would be sufficient to prevent a revocation.

With regard to the declarations by the testator, after his

(a) 1 Dougl. 31.

(b) 2 East, 530.

(c) Cited 1 Ves. sen. 440, 489.

(d) 7 Taunt. 295.

will, it is submitted that neither statute nor principle intervene to prevent their admission.

*Cur. adv. vult.*

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TINDAL C. J. in the ensuing Hilary term (Jan. 26,) delivered the judgment of the Court:—This case has been brought by three writs of error from the Court of Queen's Bench, where judgment has been given for the lessor of the plaintiff on a special verdict. The plaintiff below brought an ejectment to recover certain lands in Staffordshire, the trial of which action was removed by a suggestion on the record to Gloucester, where it took place before my brother *Alderson*. Upon the trial cross bills of exceptions were tendered to, and allowed by, the learned judge; that on the part of the lessor of the plaintiff, containing exceptions, as well against the admission of evidence given by the defendant below, as also for the rejection of evidence which he had offered; that on the part of the defendant below, for the rejection of evidence only. One of the writs of error has been sued out by the defendant below to bring up the judgment, which was given without argument on the special verdict; and each party has brought up his own bill of exceptions by a writ of error sued out by himself.

Another action, namely, an action of trover for the title deeds of the same estate, had been brought by the lessor of the plaintiff against the defendant below, in the Court of Exchequer, and came on for trial before the same judge at the same assizes; and as the very same question arose in both actions, a course precisely similar was pursued in both, and for the purpose of avoiding, as well unnecessary expense to the parties, as loss of time to the respective Courts of Error, it was thought convenient that the argument of the writs of error in the first-mentioned cause should take place in the presence of all the judges of the three Courts of Westminster Hall; the parties having consented that both cases shall abide the decision of the present, and this case has accordingly been argued in the presence of all the judges of England, with the exception of Lord *Denman*.

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On the part of the plaintiff in error (the defendant below) it was contended, that admitting the general rule to be established, that marriage and the birth of a child operated as the revocation of a will made before the marriage, where the wife and child were left without provision, yet such revocation was grounded on an implied intention of the testator to revoke his will under the new state of circumstances which had taken place since the will was made, and upon such implied intention only; and, consequently, that any evidence was admissible on the part of the devisee, which shewed a contrary intention, in order to rebut such presumption.

On the part of the defendant in error it was contended, that such revocation, under the circumstances above supposed, is the consequence of a rule of law, or of a condition tacitly annexed by law to the execution of a will, that when the state of circumstances under which the will is made becomes so materially, or rather entirely, altered by a subsequent marriage and the birth of a child, the will should become void; and that the operation of this rule of law was altogether independent of any intention on the part of the testator.

The broad question, therefore, which has been argued between the parties has been, whether evidence of the testator's intention, that his will should not be revoked, is admissible to rebut the presumption of law, that such revocation should take place? And we all concur in the opinion, that the revocation of the will takes place in consequence of a rule or principle of law, independently altogether of any question of intention of the party himself, and, consequently, that no such evidence is admissible.

The plaintiff in error, in support of the proposition for which he contends, has relied on the authority of various decisions of cases, as well in the Ecclesiastical Courts as in the Courts of Common Law. With respect to the former we cannot but entertain considerable doubt, whether their authority can be held to apply to the present question. For, whilst we are entirely convinced of the importance of a

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uniformity of decision between the courts of ecclesiastical and of common law jurisdiction, where the same state of facts is under investigation, or the same principle of law is under discussion in each : and entertaining as we do, at the same time, the highest respect for the learning and ability of those by whom justice is administered in the Ecclesiastical Courts, we cannot forget that, in the question now before us, we have to deal with the provisions of a statute, with which the questions ordinarily coming before *them* are wholly unincumbered. The question now before us relates to the revocation or non-revocation of a will *devising real property*. It is a question, whether such revocation shall be allowed to depend upon evidence of intention, that is, upon evidence of which parol declarations of the testator may confessedly form a part ; whilst the Statute of Frauds has anxiously and carefully excluded evidence of that nature, with respect both to the original making and the revoking of wills of land. The Ecclesiastical Courts, on the other hand, are concerned in the granting probate of wills and testamentary papers *relating to personalty only* ; in which cases no statutory enactment has excluded parol evidence of the intention of the testator, as to what shall or shall not be a testamentary paper, or what shall or shall not amount to a revocation or republication of a will. On the contrary, the evidence bearing on these points is generally mixed up with declarations of the party, and frequently consists of such declarations alone. The decisions therefore in the Ecclesiastical Courts, referred to by the counsel for the plaintiff in error, may be sound decisions with respect to the subject-matter to which they relate, and may yet furnish no authority on the case now in judgment before us. And if that question is to be decided, as we think it is, by the weight of the authorities to be found in the Courts of Common Law, the balance preponderates greatly in favour of the proposition, that no evidence of intention is to be admitted to rebut the presumption of law, that a will is revoked by subsequent marriage and the birth of a child.

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The cases relied on principally by the plaintiff in error (the defendant below), are those of *Brady v. Cubitt* (a), and *Kenebel v. Scrafton* (b); those which are appealed to by the defendant in error (the lessor of the plaintiff), are *Doe v. Lancashire* (c), and *Goodtitle v. Otway* (d).

Now, with respect to the case of *Brady v. Cubitt* (a), it must be admitted that the opinion of Lord *Mansfield* is expressed in terms the most explicit and unreserved, "that the presumption of revocation from marriage and the birth of children, like all other presumptions, may be rebutted by any sort of evidence." But it must at the same time be observed, that the decision of that case rests also upon other grounds, which are altogether satisfactory and free from objection; viz. first, that the disposition made by the will was of *part only*, not *the whole* of the estate; and secondly, that the instrument executed after the death of the child operated as a *republication* of the devise contained in the will. And as to the case of *Kenebel v. Scrafton* (b), it affords no authority whatever for the position, that such implied revocations can be rebutted by parol evidence of a contrary intention existing in the testator's mind; because, in that case, the objects of the marriage were contemplated and provided for by the will, so that there was no implied revocation whatever of *the will*; and next, because the question as to the admissibility of such evidence is expressly declared by Lord *Ellenborough*, in giving the judgment of the Court, to be left entirely untouched by the decision of that case.

And looking, on the other hand, at the cases relied upon on the part of the lessor of the plaintiff, we agree entirely with Lord *Kenyon* as to the ground upon which the doctrine of implied revocation, under the circumstances now before us, ought to be rested. That very learned judge, in giving his judgment in the case of *Doe v. Lancashire* (c), treats it as a principle of law, of which he suggests the foundation

(a) 1 Doug. 31.

(b) 2 East, 530.

(c) 5 T. R. 49.

(d) 2 H. Bl. 516.

to be a tacit condition annexed to the will itself, when made, that it should not take effect if there should be a total change in the situation of the testator's family; and this foundation of the rule is confirmed by the judgment of Lord *Ellenborough* in the case above referred to (a), where he says this ground is to be preferred "to any presumed alteration of intention; which alteration in intention should seem in legal reasoning not very material, unless it be sufficient to found a presumption in fact, that an actual revocation has followed thereupon." The case again of *Goodtitle v. Otway* (b), although not the same in circumstances, yet establishes the very same principle as that contended for by the defendant in error. That case did not, indeed, relate to the revocation of a will by a subsequent marriage and the birth of a child; but to the revocation of a will by a subsequent conveyance of lease and release, executed for a limited purpose only; but the same principle was laid down, that parol evidence shall not be admitted to shew that the testator meant his will to remain in force against the revocation implied by law from the execution of such subsequent conveyance; the Lord Chief Justice *Eyre* stating his opinion to be, that in cases of revocation by operation of law, "the law pronounces upon the ground of a *presumptio juris et de jure*, that the party did intend to revoke, and that *presumptio juris* is so violent that it does not admit of circumstances to be set up in evidence to repel it; and this makes it difficult," he says, "to understand the case in *Douglas* (*Brady v. Cubitt*), supposing that to be a case of revocation by operation of law, and not within the Statute of Frauds." And we think this opinion at which we have arrived not only supported by the authority of the decided cases, but the only one which is consistent with the provisions of the Statute of Frauds. For, if against the intention to revoke, which is presumed by law, parol evidence of a contrary intention could be admitted, such as evidence of conduct of the testator leading to

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(a) *Kenebel v. Scrafton*, 2 East, 530.

(b) 2 H. Bl. 516.

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the inference that he meant the will to stand, or of declarations to that effect, then it would be but reasonable to allow such evidence to be met and encountered by evidence of conduct of the testator, leading to a different inference, and of declarations contradictory to the former. And again, the admission of such evidence leads to this further difficulty, that if the testator changes his first intention and adopts a contrary one, which of the two intentions is to prevail? Is it to be the first, which is clearly expressed and proved, or is the latest formed intention, like the last will, to be allowed to predominate? It was precisely to preserve us from the perplexity and uncertainty of such conflicting evidence, both in the making and revoking of wills, that some of the provisions of the Statute of Frauds were expressly framed. We think, therefore, such evidence was inadmissible; and that the rejection of it, when offered by the plaintiff in error (the defendant below), was right; and that the bill of exceptions tendered upon that ground by the defendant below, and allowed by the learned judge, has entirely failed. But the plaintiff in error contends that the rule of law to which we have adverted does not apply to the case before us. It seems necessary therefore to determine what is the precise rule of law upon this subject, and to consider the objections urged against its application to the present case; and upon a careful examination of the several cases which have been decided on this point, we take the rule of law, so far as it is material to the present inquiry, to be this—that in the case of the will of an unmarried man, having no children by a former marriage, whereby he devises away the whole of his property which he has at the time of making his will, and leaves no provision for any child of the marriage, the law annexes the tacit condition, that subsequent marriage and the birth of a child operate as a revocation. Now, with respect to the rule so laid down, the plaintiff in error objects, that the exception to it is not confined to the single case where a provision is made by the will to the children of the marriage, but that the case is also excepted in which a provision is made by the will for either the wife or the

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children : and still further he contends, that if it is necessary that provision should be made for both wife and children, it is enough that it is made either by the will itself, or any subsequent provision, and that upon the facts of this case it appears a provision is made for both, in the one way or the other : and further, that the estate which was conveyed to the testator, after the making of his will, being an after-purchased estate, did not pass thereby, but descended to the child of the marriage, as his heir at law, and thereby formed such a provision for him. With respect to the first objection, we are all of opinion that, under the circumstances above supposed, in order to prevent the revocation of the will, and to take the case out of the general rule, it is not sufficient that a provision is made for the wife only, but that such provision must also extend to the children of the marriage. The children of the marriage, both in the consideration of our law and of the civil law, from which the rule itself has been adopted, are the subjects of the marked anxiety of both codes of law. This is evident from the preamble to the Statute of Wills, 32 H. 8, c. 1, which recites, as the object of the statute, the enabling the king's subjects to further "the good education and bringing up of their lawful generations," and "to discharge their debts, and after their degrees, set forth and advance their children ;" and still further, the observation of Lord Chancellor *Nottingham* (a) in the case of *Pitt v. Pelham and another* (a), is direct upon the point : "The ground of the Statute of Wills is the good of children and posterity," and no case has been decided in which the will has been held to be not revoked, where the Courts have not acted on the principle that the provision was not made for the wife only, but extended to the children also. In the case of *Eyre v. Eyre*, cited in 1 *P. Williams*, 304, the will appears to have been held to be revoked upon the ground that no provision is made for the child ; and the case of *Brown v. Thompson* (b),

(a) 2 Freeman, 134. The observation seems made by the Reporter, who was afterwards (1706)

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(b) 1 Eq. Cas. Abr. 413.



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which at first seems to lead to a contrary conclusion, does in fact support the principle now laid down. In that case the testator had devised an estate to the woman whom he afterwards married, and her heirs; and Sir *John Trevelyan* M. R. held the will to be revoked by the subsequent marriage and the birth of a child, which must necessarily have been on the ground that no provision was made *for the child* (a). And although this decree was afterwards reversed by the Lord Keeper *Wright*, yet such reversal (the propriety of which seems very doubtful) expressly recognises the principle, that the children of the marriage must be provided for by the will; for he assigns as the reason for the reversal, "that no injury was done to any person, and those are provided for whom the testator was most bound to provide for," meaning thereby, that the child was to be considered as provided for, by reason of an estate of inheritance having been given to the mother. And the case of *Kenebel v. Scrafton* (b) (before referred to) confines the exception to the case where both wife *and* children are provided for by the will. Taking, therefore, the rule of law to be, that the children of the marriage must be provided for in order to prevent the revocation of the will, it is obvious that no provision whatever is made by this will for any child of the marriage; and whether any provision whatever is made for *the wife* by the devise to her of the estate for life, upon the condition expressed in the will, or whether she could claim a provision by her right to dower, we give no opinion whatever, because it is obvious that such provision for the wife, if it exists at all, is limited to her for life only, and cannot be extended in any way to form a provision for the children of the marriage.

But it is further objected, that an after-purchased estate did not pass by the will, but descended upon the son in fee, and thereby became a provision for him, and prevented the revocation of the will. In the first place, we answer, that no case can be found in which after-acquired

(a) 1 P. Williams, 304 n.

(b) 2 East, 530.

property descending upon the child, has been allowed to have that effect; and, indeed, such a proposition seems incompatible with the nature of a condition annexed to the will, which, so far as it relates to the existence or extent of the provision, must in its own nature have reference to the existing state of things at the time the will itself was made. But, secondly, it appears to us a conclusive answer to the objection that, upon the statement of facts in the special verdict, the testator had in him, at the time of making his will, an equitable interest in the estate in question, which equitable interest passed to the devisee under his will, so that the subsequent conveyance of the legal estate to the testator would give no real or beneficiary interest to his heir at law, but would make him a trustee for the devisee; for it is well established, that an estate contracted for will pass under general words of devise in a will, even though the agreement to purchase is not to be carried into execution until a future day, which does not occur until after the time when the will bears date (a); and in this special verdict it appears that the contract to purchase, so entered into by *Joseph Fox*, upon his dying intestate and unmarried, descended upon and came to *John Fox*, his elder brother, and sole next of kin and heir at law, and the person entitled to take out administration to his personal estate. *John Fox*, therefore, at any time after his brother's death, had the right to file a bill in equity for the specific performance of the contract, and was therefore seised of the equitable estate at the time of making his will. Holding, therefore, as we do, that the beneficiary interest in this estate passed under the devise, we consider the descent of the legal estate upon the child of the marriage, to have formed no provision for him, but that he was left wholly unprovided for, as he neither took any thing under the will, nor any

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(a) See *Potter v. Potter*, 1 Ves. 16 Ves. jun. 253, reported nom. sen. 437; see also the case cited *Laves v. Bennett*, 1 Cox, 167; from the Rolls in 7 Ves. jun. 436; *Greenhill v. Greenhill*, Prec. Ch. 320.

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thing (if that would have been sufficient,) by descent from the father.

We therefore think the will revoked, and that the lessor of the plaintiff is entitled to have the judgment affirmed which has been already given for him on the special verdict; and this makes it unnecessary for us to give any judgment upon the bill of exceptions tendered by the lessor of the plaintiff, for, as he is entitled to our judgment on the facts found by the jury, that bill of exceptions may for the present be considered as wholly immaterial, or as if it had never been tendered at the trial; though at the same time we have no hesitation in declaring our opinion to be, that the learned judge was right in admitting the evidence therein mentioned, but wrong in rejecting the evidence which was offered to prove that *Joseph Fox* entered into the agreement of purchase stated in the bill of exceptions, as the agent of *John Fox*.

Upon the whole, therefore, we are of opinion that the judgment of the Queen's Bench must be affirmed.

Judgment for the defendant in error.

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The QUEEN v. The Company of Proprietors of the LEEDS and LIVERPOOL NAVIGATION.

1. By the 10 *Geo. 3, c. cxiv.* ON an appeal against a rate for the relief of the poor of a Canal Com- the parish of Liverpool, in which the defendants were rated pany was in- corporation, with power to make a canal and to take tolls, and by section 49, it was enacted, "that the said tolls shall at all times hereafter be *exempted* from the payment of any taxes, rates, assessments, or impositions whatsoever, any law to the contrary notwithstanding, other than such taxes, rates, &c. as the land which shall be used for the purposes of the said navigation would have been subject to, if this act had not been made." The 23 *Geo. 3, c. xlvii.* repealed this act, and incorporated another navigation with the above-mentioned, and contained a similar exempting clause as to the tolls to be taken. By the 59 *Geo. 3, c. cv.* the Company were empowered to make a cut, and all the *exemptions* in the former act were extended to the purposes of that act; and by section 17, the lands, houses, wharfs, warehouses, and other houses of the Company were to be rateable to the poor, as lands &c. of a like quality, where the same shall be situate.

Held, 1st, That the land occupied by the original line of the canal was to be rated as land, without reference to its use as a canal, according to the annual value of the adjoining land at the time of the making the rate.

2nd. That the *lands* mentioned in section 17, meant the land of the canal covered with water.

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for "their lands, canal navigation, warehouses, sheds, houses, stables, cranes, weighing machines, branches, basins, cuts and wharfs," at the sum of 3400*l.*, the Michaelmas Sessions, 1834, for the borough of Liverpool, confirmed the rate, subject to the opinion of this Court upon a case, which stated in substance as follows :

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By the 10 *Geo. 3*, c. cxiv. (local) the above-mentioned Company were incorporated and empowered to purchase lands for the use of the navigation, and to make a canal from Leeds to Liverpool, with all the powers necessary thereto, and were also empowered to take certain rates and tolls along the line of the canal. Section 49 of this act enacted, "that the said rates, tolls and duties shall, at all times hereafter, be exempted from the payment of any taxes, rates, and assessments or impositions whatsoever, any law or statute to the contrary notwithstanding, other than such taxes, rates and assessments as the land which shall be used for the purpose of the said navigation would have been subject to if this act had not been made."

The 23 *Geo. 3*, c. xlvii. (local) incorporated the river Douglas Navigation with the Leeds and Liverpool Canal, and by sect. 31, it was enacted and declared, "that the said several navigations, cuts or canals, and every part thereof, and the said rates, tolls and duties to be taken upon the same, or any part thereof, under the authority of this or either of the aforesaid acts, shall at all times be exempt from the payment of any taxes, rates, assessments or impositions whatsoever, other than and except such taxes, rates and assessments as the land which hath or shall be used for the purpose of such navigations, cuts, or canals, were or would have been subject to if this act had not been made; and that such navigations, cuts or canals shall not be subject or liable to the payment of any taxes, rates, or

3d. That the branches of the canal must be considered as part of the whole navigation, and were rateable on the same principle.

2. The 23 *Geo. 3*, c. xlvii. s. 31, which contained the exempting clause from rates and taxes of the tolls of the canal, excepted therefrom quays, wharfs, warehouses or other houses. Held, that wharfs erected by the Company on their branches, were to be rated according to their annual value to let.

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assessments, save and except such taxes, &c. as have been and now are usually charged and assessed thereon, any law or statute to the contrary notwithstanding; but nothing in this act shall be construed to exempt any quay, wharf, warehouse, or other house, from the payment of any rates, taxes or assessments." Sect. 41 repealed the 10 *Geo. 3*, c. cxiv.

By the 59 *Geo. 3*, c. cv. (local and personal) the Company were empowered to make a cut from Hennis Bridge to join the Duke of Bridgwater's canal at Leigh, and all the powers &c., *exemptions* &c., matters and things contained in the former acts of parliament not repealed, were extended to the purposes of that act. Section 17 of this act enacted, "that all and every the lands, dwelling-houses, wharfs, quays, warehouses, lockhouses, and other houses of and belonging to the said Company of Proprietors, shall be rateable and chargeable to the maintenance of the poor, and to all parochial rates and taxes in the several parishes, townships or places where they are respectively situate, the lands according to the quantity and quality, and the dwelling-houses, wharfs, quays, warehouses, lockhouses, and other houses according to the nature and respective uses, dimensions and descriptions thereof, and shall be charged and assessed in like manner as lands of a like quality, and as dwelling-houses, warehouses, lockhouses, and other houses of a like and similar size, nature, dimensions or descriptions in the respective parishes &c., where the same shall be situate, are or shall be assessed and charged; and that, as well the rates, duties and other personal property of the said Company, liable to be rated to the poor and other parochial taxes, in any such parishes, townships, or places, as also the tolls, rates, and duties hereby granted to the devisees of the said Duke of Bridgwater, shall be rated and assessed in like manner and in the same proportion as other personal property rateable in the said parishes &c. respectively shall be rated and assessed, and according to the length of the line of the said canals and navigations in such respective parishes &c., and not otherwise, or in any other manner."

The Leeds and Liverpool canal has been finished, and a communication has been made between Leeds and Liverpool, terminating at the North Lady's Walk in Liverpool. The Company have, since the passing of the 10 Geo. 3, c. cxiv. and also of the 39 Geo. 3, c. cv. purchased different pieces of land, in which they have cut the branches and basins hereinafter mentioned, under the general powers contained in the above acts, branching out at several points from the original parliamentary line, towards and into the town of Liverpool. Upon the land so purchased, and upon the sides of the said branches, the Company have wharfs, which are of considerable advantage to the public and those trading upon the canal, and to the Company; but the Company do not take any additional tolls for such cuts, other than wharfage upon the wharfs adjoining the cuts. ]

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The Company are in the occupation, within the parish of Liverpool, of a warehouse, shed, manager's house, cranes, and weighing machines, which, according to the value of similar adjacent property, are of the annual value of 524*l*. As to the value of the above property there is no dispute, and the said rate is right in respect thereof.

The Company are also in the occupation, within the parish of Liverpool, of a portion of their canal, basins and towing paths, being in the original and parliamentary line, which canal &c. contain 51,555 superficial square yards; and the land, if it is to be estimated according to its value as agricultural land, at the time of the passing of the 10 Geo. 3, should be rated at 30*s*. an acre only, and the amount at which the Company should be rated, on this principle, would amount to 16*l*. If it is to be estimated as mere land, according the value of adjoining land at the present time, its value is 1806*l*. 3*s*. 6*d*. If it is to be estimated as land used for navigation, on a criterion of what the land so used would let for, supposing the party taking it to form his calculation from the amount of the tolls received on the whole line of the canal (deducting the necessary expenses) and applying the profits to the portion of the canal in the parish of Liverpool, the amount to which the Company would be

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rateable is 698*l.* 2*s.* 9*d.* If it is to be estimated as land used for navigation, upon the criterion of what it would let for on a calculation formed upon the amount expended in rendering the land within the parish fit for navigation, as it now exists, the land is of the annual value of 3612*l.* 7*s.*

Besides the said property in the original parliamentary main line of the canal, the Company are in the occupation of the branches and basins so cut by them in the land bought by them as aforesaid, which consists of a certain basin and three branches, with wharfs on each side, in the parish of Liverpool, to the eastward of the said canal, but communicating with it. The first of the three branches was made in the year 1801, and was afterwards enlarged; the second was made in the year 1816, and was enlarged in 1824; the third was made in 1828. Upon parts of the first and second branches, the Company have wharfs in their own occupation, for the use of the traders on the canal; on the third branch, the Company have wharfs which are in the occupation of tenants, on parol demises from year to year. The tenants have the sole privilege of navigating the said third branch, but the land of the third branch is not demised by the Company. The tenants would not pay the same amount of rent, unless they enjoyed the privilege of navigating the said branch. The said basin and branches, if they are to be estimated according to the purposes for which they are used, are of the annual value of 2*s.* 6*d.* per square yard; if as mere land, 1*s.* The area of the three branches and basin, at 2*s.* 6*d.* per yard, is worth 1713*l.* 12*s.* 6*d.*, and at 1*s.*, 685*l.* 9*s.*

The Company are also in the occupation of three wharfs, which are as mere land, without reference to the use thereof, of the annual value of 1*s.* per square yard, according to the value of the adjacent property [viz. 11,913 yards, at 1*s.*, equal to 595*l.* 13*s.*] These wharfs and packet office are maintained by the Company, and they receive a profit therefrom. As wharfs, according to the value of similar property in Liverpool, the wharfs are of the annual value of 1*s.* 2*d.* per yard, or 694*l.* 18*s.* 6*d.*

Stock-in-trade, profits, and other personal property are not rated in Liverpool. The rate for the parish of Liverpool is laid upon the principle of taking the fair annual value of the property to be let.

The questions for the opinion of the Court are :—I. Whether, under the several acts of parliament, the land of the original line is to be rated according to its value in 1770 (10 *Geo.* 3), or according to its value at the time of making the rate, with reference to the value of the adjoining land, or according to its value for the purposes for which it is used ; and if so, according to what criterion is that value to be ascertained ?

II. According to which of the above principles the branches, basins, and wharfs are to be rated, the said rate to stand or be amended accordingly ?

This question was argued in Trinity term last (a), by

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*Cresswell* and *Crompton* in support of the rate. The first question is, whether the land of the canal in the original or parliamentary line should be rated according to the value which it may have borne as mere land in 1770 or at the present value of adjoining lands, or according to its value for the purpose for which it is used. The second question regards the land of the basin and wharf. [Lord *Denman* C. J. We are clear at present that the date of 1770 is not to be taken in estimating the value ; that was decided in *Rex v. Monmouthshire Canal Company* (b) ]. Then, as to the third criterion of value suggested, it is impracticable. The appellants cannot ascertain the profits of the whole canal from Liverpool to Leeds, and then apply a portion for this purpose. *Rex v. Kingswinford* (c) is conclusive against such a mode of rating by proportion ; *Rex v. Earl of Portmore* (d). There remains only the mode of rating according to the value of the adjoining lands, which it may

(a) June 7th, before Lord *Denman* C. J., *Littledale, Patteson,* & *Williams, Js.* (c) 7 B. & C. 436. S. C. 1 M. & R. 20.

(b) 3 Ad. & E. 619 ; S. C. 5 N. & M. 68. (d) 1 B. & C. 551 ; S. C. 2 D. & R. 798.



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be supposed the land in question would have borne at the present day if the canal had never been made. Next, as to the branches and basins cut in pursuance of the 59 Geo. 3, and not within the original line: the rate should be made, if not according to the amount of 2s. 6d. per yard, to which their value would amount if estimated according to the purposes for which they are used, at least according to the amount of 1s. per yard, being that which they would bear if estimated according to the present value of adjoining property. The same principle applies to the wharfs and quays, concerning which the third question is raised. (They cited also *Rex v. Chelmer and Blackwater Navigation*)(a).

Sir F. Pollock, Atcherley Serjt., Wightman and Henderson contrà. This question has been treated on the other side as if the rateability of the premises depended entirely on the words of the 59 Geo. 3, c. cv. s. 17. But these must be compared with the language of the preceding acts. By the 23 Geo. 3, c. xlvii. s. 31, the rateability of the " navigations, cuts and canals," is defined. The " lands" mentioned in the 59 Geo. 3, must therefore be taken to mean other lands than those covered with water, which constitute the navigations, cuts and canals. Next, as to the mode of estimating the amount. It is necessary to distinguish this case from *Rex v. Monmouthshire Canal Company* (b), *Rex v. Calder and Hebble Navigation Company* (c), *Rex v. Chelmer and Blackwater Navigation Company* (a), *Rex v. Kingwinford* (d), *Rex v. St. Mary, Leicester* (e), *Rex v. St. Peter the Great, Worcestershire* (f), and others, in which the acts establishing the rateability contained the words " from time to time," " for the time being," or equivalents. No such words are contained in the 10 Geo. 3, or the subsequent acts, incorporating and giving additional powers to this Company. It is simply declared that the tolls and duties shall be exempt from any rates, &c., other than such as the land

(a) 2 B. &amp; Ad. 14.

(d) 7 B. &amp; C. 236.

(b) 3 Ad. &amp; E. 619; 5 N. &amp; M.

(e) 6 M. &amp; S. 400.

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(c) 1 B. &amp; Ald. 263.

(f) 5 B. &amp; C. 473. S. C. 8 D. &amp; R. 331.

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would have been subject to if this act had not been made.

Here then we are necessarily thrown back to the state of things at the point of time when the canal was made, as an element in the criterion of value. The neighbouring land was then only used for agricultural purposes. Tolls were specially exempted, as a benefit to the Company, before it was law that navigation tolls *eo nomine* are not rateable; *Rex v. Leeds and Liverpool Canal Company (a)*.

Thus it is plain that a benefit was meant to be conferred on the Company: that in compensation for their large outlay, and in consideration of the public advantage derived from their works, they should not be in any way rated for the increased value conferred by them on the property. If so, the amount at which the land was then let, to be used for agricultural purposes, must be adopted. The wharfs and warehouses, it is admitted, are not contained in this exemption, and their value must be differently estimated. The language of the 59 *Geo. 3*, "lands of a like quality," points to the same conclusion. Lands of a like quality must mean land used for agricultural purposes, as the adjoining land was at the period when the canal was excavated. Thus, at all events, even if the criterion first suggested be not adopted, the Company cannot be rated higher than the present value of the nearest land used for agricultural purposes, and not according to the enormously increased value which other causes have subsequently given to the land actually adjoining. This is the principle of *Rex v. The Grand Junction Canal Company (b)*. Next, as to the basins and branches: they are no part of the canal. To the Company they are unproductive, except as increasing the value of the wharfs and warehouses on their banks. But for the value of the wharfs the Company is already rated; for the value of the warehouses their tenants in occupation are already rated, for these pay a larger rent in consequence of the value given to the warehouses by their juxta-position to the canal. The parish therefore already obtains a rate on

(a) 5 East, 325.

(b) 1 B. &amp; Ald. 289.

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this part of the property proportioned to the whole beneficial occupation.

*Cur. adv. vult.*

Lord DENMAN C. J., in Hilary term, 1838, delivered the judgment of the Court.—This was an appeal against a rate for the relief of the poor of the parish of Liverpool, in which the Company were rated for their “lands, canal navigation, warehouses, sheds, houses, stables, cranes, weighing machines, branches, basins, cuts, and wharfs,” in the sum of 3400*l.*, and subject to the opinion of this Court upon a case stated. The Court of Quarter Sessions for the borough of Liverpool confirmed the same. From that case it appears, that by virtue of several acts of parliament (hereafter to be more particularly noticed) the said Company completed a canal from Liverpool to Leeds, which is called the “Original and Parliamentary Line,” and have also made communications between that and other navigations, at a distance from the borough of Liverpool, not necessary to be more fully described. They have also made, and are in the occupation of, certain branches or cuts and basins, within the said borough of Liverpool, communicating with the said principal line, and also quays, wharfs, and various other property connected with the same. It may be proper, for the sake of clearing the way, to observe, that as to the sum of 524*l.*, parcel of the 3400*l.*, assessed on a warehouse, manager’s house, shed and cranes, the rate is admitted to have been properly imposed, being estimated according to the annual value of similar adjacent property. The contested points we shall take in the order in which they occur in the statement of the case. But it will be necessary now to advert to those parts of the different acts of parliament upon which the questions depend, and these will be found to be the clauses exempting “the rates, tolls and duties,” from the payment of rates. The original act (10 *Geo. 3*, c. cxiv), incorporating the said Company, and empowering them to take rates, tolls and duties, upon the canal, has the following exempting clause (section 49): “And be it also

further enacted and declared, that the said rates, tolls and duties, shall at all times hereafter be exempted from the payment of any taxes, rates, assessments, or impositions whatsoever, any law or statute to the contrary notwithstanding, other than such taxes, rates and assessments, as the land which shall be used for the purpose of the said navigation would have been subject to, if this act had not been made." The next act (23 Geo. 3, c. xlvii.), which was passed for one of the purposes before alluded to, namely, for incorporating the river Douglas navigation with the said canal, and for amending the first-mentioned act, repeals the exempting clause above set forth and substitutes the following: "And be it further enacted and declared, that the said several navigations, cuts or canals, and every part thereof, and the said tolls, rates and duties, to be taken upon the same, or any part thereof, under the authority of this or either of the aforesaid acts, shall at all times be exempted from the payment of any taxes, rates, assessments, or impositions whatsoever, other than and except such taxes, rates and assessments, as the land which hath been or shall be used for the purpose of such navigations, cuts or canals, were or would have been subject to if this act had not been made; and that such navigations, cuts or canals, shall not be subject or liable to the payment of any taxes, rates or assessments (save and except such taxes, rates and assessments, as have been and now are usually charged and assessed thereon), any law or statute to the contrary notwithstanding, but nothing in this clause shall be construed to exempt any quay, wharf, warehouse, or other house, from the payment of any rates, taxes or assessments." The 59 Geo. 3, c. cv. which was passed chiefly for effectuating another of the purposes before alluded to, namely, a junction between the Leeds and Liverpool and the late Duke of Bridgewater's canal, after continuing the provisions of the former acts, *except such as were thereby repealed or altered*, contains the following section: "And be it further enacted, that all and every the lands, dwelling-houses, wharfs, quays, warehouses,

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lockhouses, and other houses of and belonging to the said company of proprietors, shall be rateable and chargeable to the maintenance of the poor, and to all parochial rates and taxes in the several parishes, townships or places, where they are respectively situate, the lands according to the quantity and quality, and the dwelling-houses, wharfs, quays, warehouses, lockhouses, and other houses, according to the nature and respective uses, dimensions and descriptions thereof, and shall be charged and assessed in like manner as lands of *a like quality*, and as dwelling-houses, warehouses, lockhouses, and other houses of like and similar size, nature, dimensions or descriptions, in the respective parishes, townships or places, where the same shall be situate, are or shall be assessed and charged." The first question arises upon the portion of land within the parish of Liverpool, occupied by the canal, basins, and towing-path, of which the extent is given from actual admeasurement in square yards. If it had not been for one observation of the counsel for the appellants (hereafter to be noticed), it might have been doubtful whether it was meant to be argued that this land, so employed, is not liable to be rated *at all*. But be that as it may, we think the language of the exempting clauses places the matter beyond a doubt. If, indeed, those clauses had simply exempted the tolls, *without more*, it might have been contended with great reason, that as land is rateable only in respect of the profit it produces, and as tolls are the profit of land used as a canal, the subject-matter for the rate being taken away, no rate could be imposed, even though the land itself had not been expressly exempted. And this was the precise ground of the decision of the Court in the case of *Rex v. Calder and Hebble Navigation Company* (a). But here the tolls are exempted, while the land used for the navigation is left subject to a rate. And if, in a case so plain, authority were requisite, it would not be wanting from the construction put by the judges upon the two first mentioned acts of parliament, in a case concerning this very canal, reported in *5 East, 325*. Lord *Ellenbo-*

(a) 1 B. & Ald. 263.

rough there says, "The meaning of the clause of exemption is, that the land or space occupied by the canal should be liable to be taxed as it was before; that is, as the land was before;" and Mr. Justice *Lawrence* observes, that "the meaning of the clause of exemptions clearly is, that the land, quâ land, shall not be exempted, but that the tolls shall." We have therefore no doubt whatever that the land must be rated *somehow*, and that the only question is *how*. And upon this point several different modes of valuation are suggested, as to which, it might be sufficient to say which in our opinion ought to be adopted. We will observe, however, that the calculation of value, "as agricultural land," seems to be wholly unauthorized by any thing to be found in any of the acts of parliament. We reject also all calculations founded upon a supposition that the land is applied for the purposes of a canal; because, as there must be some value to make it rateable at all, its value upon that supposition must be the profits of a canal, or in other words *the tolls*, which, as we have seen, are expressly exempted, except in the event of a rate being imposed on personal property. The only remaining criterion suggested is, to take its value "according to the value of similar adjacent property in the parish of Liverpool." And we think this is the true principle, and that by reference to and comparison with what is immediately adjoining, a reasonable estimate of the actual value of the land may be obtained. And moreover (as has been before observed), this mode of valuation actually has been adopted in that part of the rate which is admitted. But is this to be the value at the time of passing the acts, of making the canal, or of making the rate? Our recent decision in the case of *The King v. Monmouthshire Canal Company* (a), answers the question, and nothing but the pressure of the most cogent reasons, or the most unambiguous language of the acts of parliament, could incline us to impose so unreasonable and impracticable a duty upon parish officers, as to

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find the value of property sixty or seventy years ago. It has not escaped us, that in the statement of this case, it is said that the value of agricultural land, in the neighbourhood in question, at the time of passing the 10 Geo. 3, was 30s. an acre. How this conclusion was arrived at we know not, but that it must have been in a great degree precarious conjecture, there is every reason to believe. The question, however, for our decision is, what is the proper construction to be put upon the acts of parliament, as to this point; and if that had depended upon the first act (10 Geo. 3, c. cxiv.), it seems impossible to raise a doubt. The exempting clause in that act, it will have been observed, is in these words, "that the rates, tolls and duties, shall be exempted from the payment of all rates &c., other than such rates &c., as the land used for the purposes of the navigation *would have been subject to*, if that act had not been made." Then to what would the land have been subject? Assuredly not to the rate which at that time might chance to be imposed, but to *any* rate which might from time to time be imposed, from a change of circumstances and of value. The 23 Geo. 3, c. xlvii. does indeed repeal the above provision, but the exempting clause (section 31) has the same precise words as those just quoted, with this addition, "and that such navigations, cuts or canals, shall not be subject to the payment of any taxes, rates or assessments, (save and except such as have been and now are usually charged and assessed thereon)." Now we are not prepared to say that these words fix and define the rate to which the land is for ever to be subject, in the manner contended for by the counsel for the appellants. The question recurs, to what rate had the land been and then was *usually* charged? Certainly not to a rate according to any fixed and never-varying standard, but to a rate variable, according to circumstances, in the manner before alluded to, and which it is unnecessary to repeat. But we are not driven to arrive at a conclusion upon this state of the question: it is important to attend to the provisions of the last act upon the subject, the 59 Geo. 3, c. cv. That in its title is declared to be an act for the purpose of

"amending the several acts relating to the said Leeds and Liverpool Canal," and incorporates the provisions of former acts, "except such as are repealed or altered by it." If, then, according to the argument, the true construction of the 23 Geo. 3, c. xlvii. be that the land should continue thereafter to be assessed in the same sum as in the then existing rate, it is certain that this provision has been repealed or altered by the 59 Geo. 3, c. cv.

Upon the language of this (the last) act it is impossible to raise a doubt, as we have before said we think it to be upon the language of the first. By the 17th section, "the lands, houses, wharfs, quays, and other property of the Company, shall be rateable in the several parishes &c. where they are respectively situate; the lands according to the quantity and quality, and the houses, wharfs, quays, and other property according to the nature and respective uses, dimensions, and descriptions thereof; and shall be assessed in like manner as lands of a like quality, and as houses &c., of a like size, nature, dimension, or description in the respective parishes or places where the same shall be situate, are or *shall be* assessed or charged." Now this we consider to be conclusive. And, even supposing the last cited section not to have "repealed or altered" the provisions of 23 Geo. 3, c. xlvii. yet it is an undoubted and acknowledged rule of construction, that statutes *in pari materia* are to be taken together; and even in this view a strong inference arises that the successive rates, and not any particular rate, were in the contemplation of the legislature. It may also be observed, before we quit this part of the subject, that the comparative method of valuation, in favour of which we have already pronounced an opinion, is here expressly recognized and adopted. We think, therefore, that the assessment upon the appellants, in respect of this part of the property, is rightly taken at the amount of 1806*l.* 3*s.* 6*d.*, the value of the land occupied by the Company in canal, basins, and a towing-path, according to the general value of the land immediately adjoining them.

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The next question arises upon the basin, and three branches, of which the appellants are the occupiers, the same not being part of the original line or trunk of the canal, but communicating therewith in the parish of Liverpool. To these branches it is stated that there are adjacent quays and wharfs on each side belonging to the Company. And, in the first place, we think that these branches must be considered as part of the whole navigation. Indeed we are not aware that the contrary was contended; but it was said that this portion of the navigation having been once rated in the shape of land, is again *virtually* rated in the increased value which it confers upon the adjacent wharfs and quays, which are assessed accordingly. That these wharfs and quays are increased in value, and will let for more to tenants, or will be more profitable to the Company if retained in their own occupation, cannot be disputed. The case indeed states it: but the thing is obvious—situation is of course a material ingredient in the aggregate value of this property. That the use of these branches and basin also directly contributes to increase the value, is, as we have already observed, beyond dispute. But we are unable to assign any precise or practical result to this fact, or to arrive at the conclusion attempted to be deduced from it, that the rate, therefore, cannot be sustained. That this part of the navigation is rateable, as land, we have already seen; and the wharfs and quays are equally so by express enactment. The amount, therefore, alone is in question; and when in this case various concurrent causes contribute to the general prosperity, and by consequence to the value of property in the place, we think it impossible for human ingenuity to reduce to a calculation, in sums certain, how much should be set down to one cause and how much to another. They are inseparable, and cannot be analysed. The value of the property must be taken *as it is*, from whatever causes arising. Suppose in the present instance the tolls had not been exempted, and that they had been rated, as they certainly might, in the shape of profits, by connecting them with

some real property of the Company situate in the parish, and it could have been clearly shewn that a great advance in the value of all property had taken place by reason of this "navigation;" would it have been any answer to such a rate, as we have supposed, that the Canal Company had been already assessed, by reason of the general increase of the rates throughout Liverpool, from the cause above mentioned? It is observable also, that in that part of the rate which is admitted to be correct, a value is set upon property so immediately and intimately connected with the navigation, that the value without it must, we presume, be reduced comparatively to nothing. We must here remark, that this precise argument and the difficulty, whatever it may be, were pressed upon us in the very same shape in the case of *Rex v. Monmouthshire Canal Company* (a), and that they then received from the different members of the Court substantially the same answer as has now been given.


We think it right to add, that having had occasion necessarily to reconsider the ground of our decision in that case, we see no reason to doubt its propriety, or to depart from it. Upon the three branches and basins, therefore, we think the assessment ought to be in the sum (mentioned in the case) of 685*l.* 9*s.*, being their amount in value as mere land at the time of rating, without regard to the use to which they are applied.

Our former observations have anticipated all that it is needful to say upon the subject of the wharfs or quays, the last species of property described in the case. We have already said that they are expressly made rateable, and that in our opinion the comparative method of valuation is the true one; that is, "according to the value of similar property in Liverpool;" in the language of the case, or (in the words of the 17th section of the 59 *Geo.* 3, c. cv.) "the lands, dwelling-houses, wharfs, quays, warehouses, lockhouses, and other houses of the Company shall be rateable; the lands according to quantity and quality, and the dwelling-houses,

(a) 3 A. & E. 619; S.C. 5 N. & M. 68.

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wharfs, quays, warehouses, lockhouses, and other houses, according to the nature and respective uses, dimensions, and descriptions thereof, and shall be charged and assessed in like manner as lands of a like quality, and as dwelling-houses, warehouses, lockhouses, and other houses of a like size, nature, dimension, or description, in the respective parishes, townships, or places *where the same shall be situate* are or shall be assessed or charged." The words "wharfs and quays" are omitted in the last member of the sentence, but they are expressly made rateable in the former part; and it is impossible to suppose that a different method of valuation was intended for them, from that which is so minutely prescribed for the other property. Indeed if no method of rating them were prescribed by the act, the value of similar property in Liverpool would furnish the best criterion of theirs, on this principle. In respect of these wharfs and quays, therefore, there must be an addition to the assessment of 694*l.* 18*s.* 6*d.*

It remains briefly to notice an observation of the counsel for the appellants, before alluded to, which was intended to go the length of shewing that the space occupied by the navigation and all its parts should be exempt from assessment altogether. It was said that the word "land," in these acts of parliament, could not mean land covered with water; for that, wherever that was designated, the words "navigation, canals, cuts," &c. are used. As to which it is to be observed, first, that it was not shewn to what other property of the Company the word "land" (accompanied with and distinguished from every other description of their property) was applicable, except to land used for their navigation. Next, this interpretation is directly opposed to that of the learned Judges, whose language we have already quoted from the report in 5 *East*, 325. But, lastly, there is no such contradiction between "land" and "navigation, cuts and canals," as was assumed, but directly the reverse. In section 31 of the 23 *Geo.* 3, upon which we have before commented, the tolls are declared to be exempt from any

rates, "except such as *the land* which hath or shall be used for the purpose of such navigation, cuts or canals, were or would have been subject to if this act had not been made, and that *such navigation, cuts or canals* shall not be liable to the payment of any rates, except such as have been and now are usually charged thereon." Except, therefore, the "land used for navigation, cuts or canals," and the words "navigation, cuts or canals," mean the same thing, the latter part of the sentence has no meaning at all. The result, therefore, is, that in our opinion the Company is liable to the extent of the assessment, and that the order of sessions, confirming the rate, should be confirmed.

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Order of Sessions confirmed.

GLAHOLME v. ROWNTREE and MATCHETT, Executors of  
 JOHN CLARK (a).

**DEBT** on a judgment recovered against the testator. Plea: plene administraverunt, except as to 4*l*. Replication: assets ultra, and issue thereon.

On the trial before *Tindal C. J.*, at the summer assizes for Newcastle, in 1835, these facts were proved: In 1832, *Clark* effected a policy for 200*l*. on his own life, with the Leeds and Yorkshire Insurance Company, and being indebted to a person named *Price* in a small amount, deposited the policy with him to secure the debt. *Clark* afterwards applied to the defendant *Rowntree* to pay off this debt, which he did, and received the policy as a security for the sum he so paid, and also to secure future advances

A party who had insured his life deposited the policy with *R.*, to secure a sum of money advanced, but did not assign it, and died, leaving *R.* and another his executors. *R.* applied to the insurance office for payment, but they refused to pay except the executors signed the receipt in their character of executors: Whereupon, under protest,

(a) This case was argued and decided in Easter term last (May 3). The publication of this and the following cases, to the end of the

volume, has been delayed on account of the long illness of Mr. *Nevile*, which terminated fatally Nov. 9th, 1838.

*R.* and the other executor signed the receipt in that form, and received the proceeds:—Held, that the money received from the office was only assets in the hands of the executors, to the extent of what remained after satisfying *R.*'s lien.

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from *Rowntree*. *Clark* gave notice of the deposit to the Insurance Company, and their agent advised that a regular assignment should be made, which was accordingly prepared, but never executed, as *Clark* went to prison, and died there in 1834, having made a will and appointed the two defendants his executors. After his death, *Rowntree* gave notice in writing to the company of the pledge of the policy to him, and demanded payment, but they declined paying to any one but the executors. Accordingly the defendants applied, with the probate of the will, and demanded the payment in their names as executors. The company requiring a receipt from them as executors, *Rowntree* signed it so worded, but at the same time protested that he did so to save the company from litigation, and not to compromise his own right to the money. His debt and the funeral expenses of the deceased amounted to the sum paid over by the company, and there were no assets beyond this sum and the 4*l*. The learned judge directed a verdict for the plaintiff, but gave the defendants leave to move to enter a nonsuit. In the ensuing term, *Cresswell* obtained a rule *nisi* accordingly, against which,

*Alexander* and *Bliss* now shewed cause. The defendants were bound to apply the proceeds of this policy in payment of the testator's debts, and as the plaintiff was a judgment creditor he had the priority. The defendant *Rowntree* was not the assignee of the policy, but held it as a pledge. He and the other defendant have received the money in their characters of executors, and were bound to distribute it as the testator's assets; *Harecourt v. Wrenham* (a). It is true that when an executor redeems goods pledged by a testator with his own money, he is chargeable with the surplus value only as executor, but if he redeems them with the money of the estate, they are assets in his hands (b). Here, in effect, the redemption was with money belonging to the estate, and

(a) Moore, 858; *S. C.* 1 Brownl. & G. 76, nom. *Harcourt v. Wrenham*.

(b) 2 Williams on Executors, p. 1179, 2d ed.

therefore the policy and its proceeds were assets. As to the claim which the defendant *Rowntree* sets up to the policy, it is clear that he only received the money in his character of executor, in which name he gave the receipt, and his protest cannot alter the effect of the admission contained in that receipt, which is an express admission of assets; *Childs v. Monins* (a), *Heune v. Rogers* (b). In *Quick v. Staines* (c), a party who had alleged goods to be her own property, was held to be precluded from saying that they really belonged to her testator, in order to defeat an execution. So here, the executors ought not to be allowed to say that the money was the property of one of them, after signing the receipt, by which it was treated as belonging to the estate. If, however, *Rowntree* can claim the money, it can only be by way of *retainer*. In the Year Book, 20 *Hen. 7*, fo. 2, this case is stated by *Frowike C. J.* of the Common Pleas, "If the testator was bound in 100*l.* to pay 20*l.* by a certain day, and died before that day, and the executor could not raise the 20*l.* from the testator's goods in consequence of the shortness of the time, if they pay the 20*l.* in salvation of the 100*l.* out of their own property, they shall retain so much out of the testator's goods, when they come to their hands." Then if the defendant *Rowntree* can only keep this money by way of *retainer*, it is clear that he has no right to retain it against the plaintiff, who is a judgment creditor whereas *Rowntree* had a mere lien, and that was on the policy only, and not on the proceeds. By the relinquishment of the policy, the lien wholly ceased; *Boardman v. Sill* (d), *Jacobs v. Latour* (e). Lastly, this lien, if it be a defence for *Rowntree*, is none for the other executor; they received the money jointly, and therefore *Matchett* must be responsible for the money which he received, and which was certainly assets in his hands.

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(a) 2 B. &amp; B. 460.

(d) 1 Camp. 410, n.

(b) 9 B. & C. 577; S. C. 4 Mann.  
& R. 486.(e) 5 Bing. 130; S. C. 2 M. &  
P. 201.

(c) 1 Bos. &amp; P. 293.

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*Cresswell* (with whom was *Granger*), contra, was stopped by the Court.

LORD DENMAN C. J.—This is a clear case. The policy was originally deposited with *Price*, and the defendant *Rowntree*, upon request, paid him off, and took the policy as a security for his debt, notice of which was given to the insurance office. On the testator's death, he went to the office with the policy and required to be paid. He is required to sign the receipt as executor. Now in some form he was bound to give a discharge to the office, and the only form which would exonerate them was in his character of executor. Can the other creditors take advantage of that signature, to deprive him of the property vested in him as a creditor, and divide it among themselves? I think they cannot in law or justice. The word *retain*, in the case cited from the 20 *Hen. 7*, cannot be taken in the strict technical sense, but must be understood as signifying that the executor is to keep the chattel which he has redeemed against the other creditors. The executor here has done no more than obtain the money to which he had a right.

LITLEDALE J.—The executor had a right to this money in payment of his own debt, and I do not consider the case so much in the light of his character of an executor as of his right to the money. The policy was no doubt legal assets at the time of the death of *Clarke*, but it was subject to a lien. Now, whoever might have had an interest in it, whether it had been legally assigned or not, the office would have required a discharge from all parties. If *Rowntree* had been a stranger, and his lien had been undisputed, the executors, finding that the debt due to him was not equal to the amount of the policy, would have gone with him to the office to claim the amount, and all would have joined in the discharge. The creditor would have taken the amount of his debt, and the executors the surplus. Supposing there had been only an equitable deposit, the executors could not have obtained the money without the creditors joining

in the application. The effect is just the same here. But it is said that the defendant *Rowntree* having signed the receipt as executor, has done a formal act, by which he has lost his right. That act cannot deprive him of his lien or vary his rights. He signed indeed under protest; the office nevertheless paid him, and the payment was made to the person properly entitled. Therefore though the policy is to be considered as assets, it is so only for the surplus, after satisfying the lien of the defendant *Rowntree*.

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PATTESON J.—This was an action against two persons as executors of *Clark*, one of whom was his creditor, having a policy of insurance deposited with him, not for a by-gone debt, but for a debt then paid off, and for money advanced on the particular security. So much for the honesty of the present claim. The defendant *Rowntree* had advanced the money on the credit of this very policy. It is said, however, that the lien was on the instrument, and not on the proceeds. I cannot understand that argument. Every one who has a lien on a bond or policy of insurance, has a lien on the proceeds. But it is contended, that inasmuch as he has been appointed one of the executors, he is to lose the benefit of his security; and because there was no legal assignment, he could not receive the proceeds for himself, but only in his character of executor. It is also urged that his claim cannot avail for the other executor, who has joined in the receipt. But he has only joined to enable the party who held the policy to get the proceeds of his lien, and the estate the benefit of the surplus. Nor has *Rowntree* defeated his lien by signing the receipt as executor, for the proceeds of the policy to the extent of the lien were not assets in the hands of the executors. This is no new doctrine, but is consistent with all the authorities. There is a fallacy on the part of the plaintiff, in treating the word *retain* in the case cited as signifying a *retainer* out of the assets. It means nothing more than *keep*. It is clear that if an executor pay off the amount of the debt, he is entitled to keep and *retain* the pawn as his own property, and shall



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not be called upon to administer it. This does not mean that he is to *retain* it as part of the assets, as executor, but because he has a lien upon it. That would be the case if no money were advanced from the testator's estate. Here no money was advanced out of the estate; but because there had been no assignment, the executors were obliged to go through the form of obtaining the money from the office. That was for the benefit of *Rowntree*, and for the surplus only would the executors be liable.

COLERIDGE J.—It would be a great disgrace to our law, if the form required to be gone through by *Rowntree*, to enable him to obtain this money, should have the effect of depriving him of his right. He was bound to sign the receipt as executor, otherwise he could not have received the money. To what extent are the executors liable? Only to the value of the chattel, after payment of the charge upon it. The case is the same as if there had been two distinct persons, *Rowntree* the creditor and *Rowntree* the executor.

Rule absolute.

ARCHER and another, Executors of ARCHER, v. MARSH (a).

Certain persons, who were carriers from London to various parts of Norfolk, and other places, agreed to relinquish their trade of carriers on a particular branch of their line for ever, in favour of A.

The only con-

sideration for the agreement was an undertaking by A. to pay them for one year a third part of the carriage on one kind of goods:—Held, that this agreement was not injurious to the public, and that as the Court could not say that the consideration for the restraint was inadequate, a covenant enforcing the agreement was not illegal.

COVENANT on a deed-poll, dated January 17, 1814, executed by the defendant, reciting that the defendant and others had carried on the trade or business of carriers from London to Cambridge, Norwich, and various other parts of the county of Norfolk and elsewhere, under the firm of &c., and that being desirous of disposing of part of such concern, they in 1812 entered into a treaty with *Thomas Archer* (the testator) for the disposal of such branch or part of their said business

(a) This case was decided in Trinity term last (June 12). See *ante*, p. 557, note.

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as extended to or from Swaffham, Mundford, Mildenhall, and the several other parishes or places contiguous or near thereto or to either of them, to London, or from London to any or either of such towns or parishes, or any parishes or places contiguous or near thereto, which were considered as belonging to their "Swaffham Waggon Concern," and which it was their intention to give up to *Archer*; and that it was stipulated that the said Messrs. *Marsh* should not, neither should any or either of them, nor the heirs, executors or administrators of them, or any or either of them, at any time thereafter, exercise the trade or business of a common carrier from any of such places to London, or from London to any such places as were formerly considered as belonging to their "Swaffham Waggon Concern;" and reciting also that the Messrs. *Marsh* had accordingly resigned such part of their said business to the said *Thomas Archer*, who had from that time continued to carry it on: It was witnessed, that for the considerations therein mentioned the Messrs. *Marsh* severally and respectively covenanted that they would not, separately or in partnership with any person, or by their partners, agents or servants, take in or convey any goods or articles of any description whatsoever, from London to any or either of such towns, parishes or places whatsoever, or any other parish or place contiguous or near thereto, and as were formerly connected with the said Swaffham Waggon and usually carried thereby, or take in and convey any butter, goods, or other articles of any description whatsoever, from Swaffham, &c. or any place contiguous or near thereto, to London, upon any account or pretext whatsoever; which said places were formerly connected with their Swaffham concern, and for the relinquishment of the carriage to which they had received the consideration before mentioned. Upon this covenant a breach was alleged, that the Messrs. *Marsh* took in and conveyed goods from London to Swaffham, &c. and from Swaffham and other places, and among the rest from Beachamwell, contrary to the tenor and effect of the said deed-poll and covenant.


The defendant set out the deed upon oyer, from which it

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appeared that the consideration for the covenant by Messrs. *Marsh* was the testator's agreement to pay one shilling per firkin upon all butter carried by him in the space of one year, such being one-third of the carriage of such butter, which was recited to have been paid accordingly. The defendant then pleaded to the breach of covenant for taking in and carrying goods from Beachamwell to London, that the Messrs. *Marsh* took in and carried no other goods than *rabbits*, and that *rabbits* were not usually carried by the Swaffham waggon or connected with the said Swaffham concern, and that the carriage of rabbits was not any part of the said branch of business relinquished by Messrs. *Marsh*, or for the relinquishment of which they had received the compensation in the deed mentioned. Verification. General demurrer, and joinder in demurrer. In Michaelmas term last,

*Wightman* argued for the demurrer. The plea is no answer to this action. The defendant is not at liberty to carry anything on this road; and there is no exception of rabbits. But it is understood that the declaration will be objected to, and it will be urged that the breach is not well assigned, inasmuch as the covenant is, that the Messrs. *Marsh* shall not carry goods as common carriers; whereas it is said that the breach extends to all modes of carrying; consequently it is too large. Assuming however that that is a defect, it can only be taken advantage of on special demurrer, and of course is cured by pleading over. There cannot, however, be any doubt that the breach really means that Messrs. *Marsh* have carried as common carriers. Another objection is taken to the covenant itself, which, it will be contended, is illegal, on the ground that the object of the parties was to create a restraint of trade. But the deed does not fall within those cases in which the Courts have held that the restriction is too general. The parties were not prevented from carrying on this trade elsewhere, but are only restrained from a particular district, namely, from the Swaffham line. Here there is an adequate consideration for their agreement, inasmuch as the testator was

to pay to them one shilling for every firkin of butter he should carry. Now many authorities establish that though the restriction must be limited either in point of time or place, it need not be in respect of both: *Mitchel v. Reynolds* (a), *Cheeman v. Nainby* (b), *Bunn v. Guy* (c), *Davis v. Mason* (d), *Homer v. Ashford* (e), *Gale v. Reed* (f), *Leigh v. Hind* (g), *Morris v. Colman* (h). If the restriction be not general, the law holds the covenant to be good. *Horner v. Graves* (i), indeed, shews that a restriction from a district may be illegal, if the district be unnecessarily extensive. But that was a very different case from the present; the limit there was a district of 200 miles; whereas here it is only of one line of road. [*Patteson J.* All these authorities were cited lately in the case of *Hitchcock v. Coker* (k).] That case is now before the Court of Exchequer Chamber, standing for argument.

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*Wallinger*, *contra*. First, the plea is an answer to the part of the declaration to which it is pleaded. The deed is very inartificial, and many of the expressions vague; but from the whole it is clear that nothing was parted with, or intended so to be, but what constituted the Swaffham Waggon Concern; that for this only was the consideration paid or agreed to be paid, and this only did *Archer* take; and the covenant was confined to the not carrying those things, the carriage of which had been relinquished. The plea states that the carriage of rabbits was no part of such concern so relinquished or paid for; and as the demurrer admits these facts, the declaration is answered. In the deed itself, which provides for the carriage which is to be given up, are the words "butter and other goods," which must mean other goods *ejusdem generis*, i. e. heavy, and requiring

(a) 1 P. Wms. 181.

(b) 2 Stra. 739; S.C. in error, 1 Bro. P. C. 234, 2nd ed.

(c) 4 East, 190.

(d) 5 T. R. 118.

(e) 3 Bing. 322.

(f) 8 East, 80.

(g) 4 Mann. &amp; R. 519; 9 B. &amp; C. 774

(h) 18 Ves. 437.

(i) 7 Biog. 735.

(k) 1 N. &amp; P. 796.

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slow waggon carriage, not those like game and similar articles, for which quick transfer in vans and light carriages is suited. Secondly, there is no sufficient breach in the declaration: it only charges defendant with having carried and conveyed contrary to the form of the covenant. Now the business parted with was the trade of common carriers, as the recital states, and the legal meaning of the covenant, to be inferred from the context, is, that defendant should not carry *as such* or *for hire*; and unless he has done so, there is no breach of covenant. The defendant may have done all that the declaration charges against him, and yet not have broken his covenant; as by carrying in his own private carriage, or not for hire. A certain distinct breach, as well as the manner of it, must be alleged, or the declaration will be bad; and the objection is not cured by pleading over: *Warn v. Bickford* (a). The addition of the words "contrary to the form of the deed," &c. will not help: *Anonymous* (b), *Clayton v. Kynaston* (c), *Knight v. Keech* (d). Thirdly, the deed declared on is illegal, the agreement constituting an unreasonable restraint of trade. It was said in *Mitchel v. Reynolds* (e) that in these cases the distinction is not between promises and bonds, but whether the agreement is with or without sufficient consideration; and in *Horner v. Graves* (f), *Tindal C.J.* says, that in *Mitchel v. Reynolds* (e) the agreement was held good, because not unreasonable as to time or distance. The restraint here is entirely unlimited in point of time, and in no case has such a restraint been held valid. In *Hitchcock v. Coker* (g) the restraint was for defendant's life, and the agreement was held bad; and in *Chesman v. Nainby* (h) it was limited to the continuance in business of the plaintiff during defendant's life. *Gale v. Reed* (i) does not shew

(a) 7 Price, 550.

(b) Sir T. Jones, 125.

(c) 2 Salk. 573.

(d) 4 Mod. 188.

(e) 1 P. Wms. 181.


(f) 7 Bing. 735.

(g) 1 N. &amp; P. 796.

(h) 2 Stra. 739; S.C. 1 Bro. P. C. 234.

(i) 8 East, 80.

that an unrestrained covenant is good: on the contrary, the covenant there was not held good until by reference to the recitals the Court had construed it into a restrained covenant. Here the agreement of 1812, which is recited, is as large as the covenant contained in the deed of 1814, and therefore will not restrain it. Besides, in *Gale v. Reed* (a) the restraint was only for the life of the defendant, and the case did not, as appears from 2 *Wms. Saund.* p. 156, n., give entire satisfaction. The consideration here is one shilling a firkin for butter taken by *Archer* during one year, which otherwise defendant would have taken, whereas the restraint is not limited to the time during which *Archer* or any of his representatives might carry on the trade, but it is on the defendant, his heirs, executors, &c. *for ever*. It is therefore unreasonable, and the agreement is illegal. Supposing it could be construed as a covenant for so long a time as *Archer* and his representatives should carry on the trade, this declaration would be bad, for it contains no statement that he or they were carrying it on.

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*Wightman*, in reply, was stopped by the Court.

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court.—This case arose on a covenant entered into between the plaintiffs and the defendant, that the latter, for considerations specified, should relinquish to the former a certain portion of their carrying trade, and abstain from exercising it within certain limits. The breach alleged was that the defendant had still continued it; and as the defence rested on the supposed illegality of the agreement, as in restraint of trade, which nearly resembled the case of *Hitchcock v. Coker* (b), decided in this Court in last Easter term, and pending in the Court of Error at the time of the argument,

(a) 8 East, 80.

(b) 1 N. & P. 796.

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it was determined to postpone our judgment till that case should be finally decided. The particular objection to the agreement, which was common to the present case and that above mentioned, was, that the restraint was much more extensive than was necessary for the full protection of the plaintiff, the purchaser of the good-will of the business. The Court of Error has reversed our judgment (a), on the principle that the restraint of trade in that case could not be really injurious to the public, and that the parties must act on their view of what restraint may be adequate to the protection of the one, and what advantage be a fair compensation for the sacrifice made by the other. We may observe, that our own opinion, when *Hitchcock v. Coker* (b) was under discussion, leant much the same way; but we thought ourselves bound by the authority of *Horner v. Graves* (c), where the Court of Common Pleas entered into an inquiry into the terms of the contract between the parties. That case appears to be overruled by the late decision in error. We not only bow to its authority, but think that in this respect it establishes a more correct and a much more convenient rule of law. Our judgment therefore must be for the plaintiffs.

Judgment for the plaintiffs.

(a) 1 N. & P. 813.

(c) 7 Bing. 735.

(b) 1 N. & P. 796.

Saturday,  
November 18th

MARTIN v. GILHAM.

A declaration alleged, that the defendant, being tenant of certain premises, wrong-

**CASE.** The declaration stated that the defendant held and enjoyed certain premises and gardens, as tenant thereof to the plaintiff, and thereupon it became the duty of the fully felled, cut down and destroyed the trees growing on the premises, and otherwise used the premises in so untenable and improper a manner that they became and were dilapidated, and in bad order and condition:—Held, that this imported a charge of voluntary waste, and was not supported by evidence of permissive waste only.

Whether a tenant from year to year is liable for permissive waste, *quære*.

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defendant to use the said premises in a tenant-like and proper manner, and not to commit any depredation or waste thereto during the tenancy; and it alleged that during the continuance of the tenancy the defendant, not regarding her duty, but intending to injure the plaintiff, wrongfully and unjustly, and in an untenable and improper manner, felled, cut down, damaged, destroyed, rooted up, and loosened, divers trees, shrubs and plants, growing and being in and upon the said premises and gardens, and otherwise used the said premises and gardens in so untenable and improper a manner that the same became and were, and still are, greatly dilapidated, and in bad and untenable order and condition, and greatly deteriorated in value. Plea, not guilty.

On the trial before *Gaselee J.*, at the Suffolk Spring assizes, 1836, it was proved that the defendant had occupied the premises under a tenancy from year to year, and that during her occupation the damage which was done to the premises was in the nature of permissive waste only, and not voluntary. Whereupon it was contended, that as the defendant was only a tenant from year to year, she was not answerable for permissive waste; but even if she were, there was a variance between the declaration and the evidence, as the former alleged a charge of voluntary waste. The learned judge directed the jury to find a verdict for the plaintiff, but gave the defendant leave to move to enter a nonsuit. In the ensuing term *Kelly* obtained a rule nisi accordingly; against which

*Storks Serjt.* now shewed cause. First, the defendant was responsible for this damage. It is true that a tenant at will is not liable for permissive waste, because his interest is too slight and uncertain to warrant him in laying out money on the premises; but that reasoning does not apply to the case of a tenant from year to year. Although there may be found some dicta which seem to imply that a tenant from year to year is not answerable for permissive waste, it



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seems more consistent with principle that he should be held responsible; and indeed the authorities, if carefully examined, do not establish his exemption. [*Litt.* § 67, and the commentary thereon, *Countess of Salop v. Crompton* (a), *Gibson v. Wells* (b), *Herne v. Bembow* (c), *Jones v. Hill* (d), *Horsefall v. Mather* (e), *Ferguson v. —* (f), and the Statutes of Marlbridge, 52 Hen. 3, c. 23, and of Gloucester, 6 Edw. 1, c. 5, were referred to by the learned Serjeant; and *Torriano v. Young* (g), by *Patteson J.*; but the Court did not give any opinion on this point.]

But, secondly, it is contended that the declaration is not proved by the evidence, because the allegations in the declaration import voluntary waste, whereas the evidence only proves a permissive waste. As, however, all voluntary waste includes permissive waste, a charge of the former may fairly be considered as embracing the latter, in the same manner as in an action on a policy of insurance, where a total loss is alleged, it has been held that evidence may be given of a partial loss; *Gardiner v. Croasdale* (h). Perhaps also it may be considered that the averring that the premises became dilapidated signifies a permissive waste, and the conclusion of the declaration must be taken to contain the actual complaint; as in *Harris v. Mantle* (i), where the breach on a covenant was assigned thus:—"that the defendant has not used the farm in a husbandlike manner, *but* on the contrary thereof has committed waste;" and it was held that evidence was not admissible of the defendant's using the farm in an unhusbandlike manner, if it did not amount to *waste*.

*Kelly* and *B. Andrews*, in support of the rule, were stopped by the Court.

(a) Cro. Eliz. 777; S. C. 5 Rep.

13 b.

(b) 1 New R. 290.

(c) 4 Taunt. 764.

(d) 7 Taunt. 392.

(e) Holt's N. P. C. 7.

(f) 2 Esp. N. P. C. 590.

(g) 6 Car. & P. 8.

(h) 2 Burr. 904.

(i) 3 T. R. 307.

**Lord DENMAN C.J.**—It would be confounding things of a very different nature if we were to hold that a declaration, which charges a voluntary waste, is supported by evidence of permissive waste only. When it is alleged that a party has committed acts of destruction, proof of acts of omission or negligence is insufficient.

**PATTESON J.**—The declaration does not contain any words which import mere negligence. The case on the policy of insurance is inapplicable, because the only question there is one of degree, and not as to different things.

**WILLIAMS and COLERIDGE Js.** concurred.

Rule absolute.

**POWELL and others v. REES, Administratrix of REES.**

*Thursday,  
November 9th.*

**ASSUMPSIT** for money had and received by the intestate to the use of the plaintiffs. *Plea*: the general issue. On the trial, before *Coleridge J.*, at the last Summer assizes for the county of Monmouth, the plaintiffs were proved to be the lessees of certain coal mines in that county. They had underlet a portion of the land contained in their demise, to a person who mortgaged his under-lease to the intestate, and the latter, for some time before his death, was in possession of the mines under this mortgage. He worked them up to the time of his death, and the defendant continued to work them afterwards, until it was discovered that the workings had been carried by the intestate, and by the defendant after his death, under three closes, which had posed of; such remedy being independent of the statute 3 & 4 *Will.* 4, c. 42, s. 2, and not affected thereby.

1. A party who had worked into his neighbour's land, and dug coal, which he had sold, retaining the proceeds, died intestate:—Held, that an action for money had and received by the intestate was maintainable against his administratrix for the value of the coal so disposed of; such remedy being independent of the statute 3 & 4 *Will.* 4, c. 42, s. 2, and not affected thereby.

2. An action of trespass had also been brought under that statute for the trespasses during the six months prior to the decease of the intestate, in which a verdict had been obtained:—Held, that the plaintiff had not thereby precluded himself from the action for money had and received in respect to the previous working.

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been excepted by the plaintiffs out of the demise. Two actions of trespass were thereupon brought by the plaintiffs against the defendant, one for the working by the intestate for the period of six months prior to his death, under the 3 & 4 Will. 4, c. 42, s. 2; the other for the working by the defendant. Verdicts were taken in these two causes, which were referred to arbitration. It was found, however, that a great quantity of coal had been taken by the intestate previous to the six months prior to his death, and as the defendant had refused to allow the value of that coal to be taken into consideration in the other actions, the present action was brought to recover the amount. It was contended at the trial that the action was not maintainable, but the learned judge overruled the objection, giving the defendant leave to move to enter a nonsuit.

*Talfourd* Serjt., on a former day in this term (*a*), moved accordingly. This action proceeds upon the principle that a party who has received an injury of the nature complained of, may waive the tort and bring an action of assumpsit, to recover any profit that may have been obtained by the wrongdoer. That certainly cannot be denied as a general rule; though perhaps there is no authority for extending it to cases of injuries to the freehold. Here, however, the wrong was committed by a party now dead, and it was settled in *Hambly v. Trott* (*b*), that executors are not liable, in any action of tort, for a wrongful act done by their testator. It is true that by the 3 & 4 Will. 4, c. 42, s. 2, provision has been made by which a remedy is given in an action of trespass or case against the personal representatives, for any injury committed six months before the death of the party committing the injury. But in the preamble to that section it is alleged that no remedy is provided by law for certain wrongs done by a person deceased in his lifetime to another, in respect of his property, real or personal. That is either

(a) Nov. 2nd, before Lord Denman C. J., *Patteson, Williams, and Coleridge, Js.*  
(b) Cowp. 371.

to be taken as a legislative declaration, that such an action as the present was not maintainable at that time, and if it were not, there is nothing in the act to authorize it; or it operates as a repeal of any such right of action, if it did exist, for it is fairly to be assumed that the legislature intended that the party should have a remedy for the injuries committed during six months, and no further. It was quite needless to make such a limitation, if the present action was still open. Again, there was no evidence of any specific sum which has been received by the intestate to the plaintiff's use, and it seems from *Harvey v. Archbold* (a), that an action for money had and received is not maintainable, unless such evidence be given.

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The COURT considered that there was sufficient evidence in this case, from which the jury might infer what money had been received by the intestate, and therefore refused the rule on that point. On the other point it took time to consider.

*Cur. adv. vult.*

LORD DENMAN C. J. now delivered the judgment of the Court.—In this case we disposed of one ground, on which a rule for entering a nonsuit was sought to be obtained upon the hearing; it remains to decide upon another, which arose under the following circumstances. (His lordship here recapitulated the facts.)

The present action was brought to recover damages for the proceeds of the sales of coals by the intestate, from under the excepted closes, for the period antecedent to the six months before mentioned, and it was objected in the first place generally, that no such action was maintainable; that the foundation of it was a tort, the remedy for which died with the person, and that the doctrine of waiving the tort and suing upon a contract implied by law, could not be extended to a case in which no remedy by action in tort

(a) 3 B. & C. 626; S. C. 5 D. & R. 500.

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existed, to be waived. We were pressed, too, by the remark, that such an action was of the first impression, and by the inference to be drawn from the language of the section above mentioned, and from the remedy there given. If, however, the legal principles upon which the action is maintainable are clear, these considerations ought not to prevail. In the present case, the money which has been produced by the sale of that which had been wrongfully severed from the plaintiff's estate, and converted into chattels, is traced into the pocket of the intestate; it cannot be doubted that an action for money had and received would have been maintainable against him for that money. His personal estate has come to the hands of the defendant by so much increased, and we cannot see any ground why the same action is not to be maintained against her who represents him in respect of that estate. In the case of *Hambly v. Trott (a)*, Lord Mansfield very fully considers this subject, and lays down the distinctions which arise as to the surviving of remedies, upon the cause of action and the form of action. He observes, "There is a fundamental distinction: if it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, &c., there the person injured has only a reparation for the *delictum* in damages, to be assessed by a jury. But where, besides the crime, property is acquired, which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator, in cutting down another man's trees, but for the benefit arising to his testator, for the value or sale of the trees, he shall." The former part of this example illustrates the operation of the recent statute; in the latter, which is the present case, it was not needed.

But it was pressed on us, secondly, that at all events this action was not maintainable after recourse had been had to

(a) Cowp. 371.

the statute just referred to, for that the plaintiffs having elected to proceed for damages for the trespass in fact, could not split it and sue in contract for the other part. The conduct of the plaintiffs may have been vexatious, but that furnishes no legal answer to this action, because, in truth, the intestate was guilty of a series of trespasses, and not of one single wrongful act. The plaintiffs, therefore, have only pursued different remedies for different injuries; they might indeed have recovered a compensation for all under the present form of proceedings, but they were not bound to do so. Upon the whole, there must be no rule.

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Rule refused.

## DOBLE v. CUMMINS.

Tuesday,  
November 21st.

A Writ of fi. fa. issued to the sheriff of Devon on the 2d of last August, at the suit of the plaintiff, against the defendant's goods, and upon the seizure notice was given by one *Joseph Perkins* that the goods seized had previously been assigned to him by the defendant, as a security for the repayment of a sum of money lent to the latter.

On a former day in this term the sheriff had obtained a rule, under the 1 & 2 Will. 4, c. 58, s. 6, calling upon the plaintiff, as execution creditor, and the claimant, to appear and state their respective claims. Accordingly *Lumley* appeared in the Bail Court for the claimant *Perkins*, and *Carrow* for the sheriff, but no one for the plaintiff. It was proposed that the latter should be barred, and that the sheriff should withdraw from the possession, but the officers at the rule office declined drawing up the rule in this form, as the execution creditor had not appeared. *Littledale J.* was applied to, but after referring to the cases of *Donniger v. Hinxman* (a) and *Lewis v. Jones* (b), declined to interfere, directing the motion to be made in full Court. And now *Carrow* having moved to make his rule absolute,

Where the claimant appeared on an application by the sheriff, under the 1 & 2 Will. 4, c. 58, s. 6, but the execution creditor did not, the Court ordered the sheriff to withdraw from the possession forthwith, and that he should be discharged from all proceedings by the execution creditor, in respect of such seizure, but refused to bar the claim of the latter against the claimant.

(a) 2 Dowl. P. C. 424.

(b) 2 Mee. &amp; W. 203.

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*Lumley* shewed cause. The claimant will be satisfied if the sheriff be ordered to withdraw from the possession of the goods: but still the question is as to the terms on which the rule is to be made absolute. In *Donniger v. Hinzman*(a), indeed, *Littledale J.* held, that where the execution creditor does not appear, he cannot be barred under the 6th section. But in *Lewis v. Jones*(b), the Court of Exchequer ordered an execution creditor, in a similar case, who did not appear, to be barred, and that seems to be the more convenient rule. The Court are empowered by the statute to settle the claims, and to make such order as may seem fit; and in the 6th section there is a reference to the powers thereinbefore granted. Now by section 3 it is provided, that if the third party do not appear, his claim may be barred. [*Coleridge J.* The execution creditor can hardly be treated as such third party.]

*Carrow*, contra. In *Eveleigh v. Salisbury*(c), where neither party appeared on such a rule, the Court of Common Pleas ordered that the sheriff should be discharged from all further liability. Unless such relief be granted here, the sheriff will obtain no benefit from his application; for if he retires from the possession of the goods, he will be exposed to an action at the suit of the execution creditor.

PER CURIAM (d).—The sheriff must withdraw from the possession of the goods forthwith, and shall be discharged from all proceedings by the execution creditor, in respect of his seizure of the goods so claimed by *Perkins*.

Rule absolute on those terms.

(a) 2 Dowl. P. C. 424.

(b) 2 Mees. & W. 203.

(c) 3 Bing. N. C. 298.

(d) Lord Denman C. J., *Patterson, Williams and Coleridge Js.*

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The QUEEN v. JONES.

Same v. OWEN.

Same v. POTTER.

Saturday,  
November 3rd.

SIR J. CAMPBELL A. G., in Michaelmas term, 1836, had obtained a rule nisi for a quo warranto information against the defendant *Potter*, for exercising the office of auditor, and against the defendants *Jones* and *Owen*, for exercising the offices of assessors, in the borough of Carnarvon, on the grounds, first, that they were not duly elected; second, that there was no proper elective body at their supposed election; third, that the mayor who presided at their supposed election was not duly elected. In Hilary term last (Jan. 30th) this rule was discharged; but in Easter term last, on the motion of *Jervis*, the rule was opened, and accordingly on this day (May 8th)

The 7 Will. 4 and 1 Vict. c. 78, s. 20, only operates as a conditional discontinuance of proceedings previously commenced; and therefore it was held that a defendant, who wished to avail himself of it, must have offered to pay the costs incurred by the prosecutor, otherwise he could not claim to stay the proceedings.

Sir W. W. Follett shewed cause against it. It is contended that the first election of councillors under the Municipal Corporation Act, which took place in 1836, under sect. 36, was void, as having been presided over by a deputy mayor instead of the Marquis of Anglesea, who was the steward of the borough, and who had no power to elect a deputy. Another objection also appears on the affidavits, namely, that the proper number of aldermen was not elected, as two aldermen had an equality of votes, and four only therefore were elected. The objection therefore is, that the corporation was not properly formed. But the Act of last session, 7 Will. 4 & 1 Vict. c. 78, s. 1, puts an end to this question, for it enacts that, subject to the provisions for discontinuing proceedings thereafter contained, all elections into corporate offices since December, 1835, shall be good, "notwithstanding any defect in the title of the person presiding at the election." Then sect. 20 enacts "that every proceeding commenced before the passing of this



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Act, and still pending in the Court of King's Bench, against any person, upon any ground on which it is herein declared that the validity of the election into any corporate office shall not be questioned, shall be *discontinued* immediately upon the passing of this Act, upon payment of the costs incurred up to that time; and the prosecutor or relator shall be entitled to receive from the defendant, in every such proceeding, all such costs." This is a new enactment in point of form, for clauses of this kind, as in the 43 *Geo. 3*, c. 84, which stayed the actions for penalties against clergymen, and those against proprietors of newspapers (5 & 6 *Will. 4*, c. 2), always give the defendant the option of defending the action, or of applying to stay them on payment of costs. The question is, whether the defendants, under this section, are bound to pay costs at all events. Suppose their title to be objectionable, it is clear that the prosecutor cannot proceed against them, for the defect in the title being cured by statute, the Court could not give judgment of ouster against them: and on the other hand, supposing the defendants to have a good title, are they to pay costs at all events? The two clauses perhaps are contradictory; but sect. 1 enacts expressly that the defendant's title shall be good. How then can the Court make the rule absolute? for that is the question before the Court, and not one as to costs. [*Cole-ridge J.* You say the Court cannot make the rule absolute; but how can we discharge the rule; for the act enacts that the proceedings shall be discontinued, and the prosecutor or relator shall receive his costs.] It is not contended that the defendants are entitled to costs: it was for the prosecutor therefore to have applied to discontinue, and not to come here to seek to make this rule absolute. The fairest construction probably would be, to hold the act itself a discontinuance of further proceedings.

Sir *J. Campbell A. G.*, and *Jervis*, in support of the rule, were stopped by the Court.

**LORD DENMAN C. J.**—We are bound to make these rules absolute, unless the late act of parliament prevents us. Now it enacts that the elections, where there has been any defect in the title of the presiding officer, shall, subject to the provisions for discontinuing thereafter made, be good to all intents and purposes. The discontinuance which is provided for in sect. 20, is, I think, dependent upon the condition of the payment of costs: which has not been fulfilled in the present case. I think the fair course for parties to pursue under this act would be for the relator to offer to discontinue if the defendant will pay the costs, but if he will not come forward to pay them, the former should be at liberty to proceed. It is still therefore possible that the proceedings may be kept alive. The title of the defendants being defective, and the new statute not having cured the defect absolutely, the rules must be made absolute.

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**PATTESON and WILLIAMS Js.** concurred.

**COLERIDGE J.**—The defendants contend that the defect is absolutely cured by the statute, and that being the case, that it is impossible for the Court to proceed, though they decline to take any step. That is a very monstrous and unjust construction. Every thing, however, which is enacted for curing the defects pointed out, is made subject to the provision for the discontinuance of the prosecution: and though it is not enacted in terms that the defendant shall be at liberty to come in and procure a discontinuance, still it seems to me that the statute must have a reasonable construction; and that every person who seeks to avail himself of it, ought to come in and apply to have the prosecution discontinued on payment of costs. In the present instance a small amount of costs may have been incurred: but suppose the parties had gone to trial, and most serious costs had been incurred, it would have been very hard if the defendant could have refused to take any further steps, and have alleged that the prosecutor's proceedings were stopped, and that he could have no costs. As the defendants have

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not availed themselves of the power given by the statute, the rules must be absolute.

Rules absolute (a).

(a) See *The Queen v. W. L. Roberts*, 3 N. & P. 295; *The Queen v. W. Roberts*, 3 N. & P. 594. The rule in the latter case is stated to have been discharged; it was in

fact made absolute for the proceedings to be discontinued, the defendant paying the costs up to the time of the passing the 7 Will. 4 & 1 Vict. c. 78.

Wednesday,  
November 8th.

The QUEEN v. The Churchwardens of the Parish of  
BRANCASTER.

To a mandamus to churchwardens to make a rate to repay money borrowed on the credit of the church-rates, it was pleaded that a fiat in bankruptcy had issued against one of the lenders; to which it was replied, that the lenders had advanced the money as trustees, out of money vested in them as trustees, and that the lender, who had become bankrupt, was only interested therein as trustee: Held good on special demurrer, alleging for cause that there was no statement of the mode by which the trust was created, or how the money was vested in them as trustees.

MANDAMUS to the Churchwardens of the parish of Brancaster, in the county of Norfolk. The writ recited that, after the passing of 58 Geo. 3, c. 45, and the 59 Geo. 3, c. 134, the Church Building Acts, to wit, on the 9th day of May, 1832, the then churchwardens of the parish of Brancaster, with the consent of the vestry of the bishop of the diocese and of the incumbent, did borrow from *George Morse*, esq. and *Robert John Turner*, upon the credit of the church rates of the said parish, the sum of 146*l.*, which was necessary for defraying the expense of repairing the church of the said parish, in pursuance of the powers vested in them by the said last-mentioned statute, and the further sum of 54*l.* for defraying the expense of extending the accommodation in the said church; and that by a deed-poll they charged the parish and the church rates with the repayment of the said sum of 200*l.* and interest; 100*l.* to be paid on the 9th May, 1833, and the other 100*l.* on the 9th May, 1834; the interest to be paid half-yearly. That the times for repayment had long since elapsed, but the money remained unpaid. That the said *George Morse* and *Robert John Turner* had applied to the churchwardens to raise by rate a sum of money sufficient to pay the said sums of money, according to the provisions and directions of the said statutes, yet the said churchwardens had refused and neglected to make such rate. The churchwardens were commanded to raise the said sum by a rate. The defendants returned that on the 16th May, 1834, a fiat of bankruptcy was duly issued against the said *Robert John*

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*Turner*, under which he has been duly found and declared a bankrupt, and which fiat is still subsisting. Replication : That the two sums were lent and advanced by the said *George Morse* and *Robert John Turner*, as trustees for other persons ; that is to say, for the widow and children of the Reverend *George Day*, deceased, to the then churchwardens, out of monies belonging to and vested in the said *George Morse* and *Robert John Turner*, as trustees of and for such other persons as aforesaid, and that the said *Robert John Turner* was and is interested in such monies only as such trustee. To this the defendants demurred, and alleged as grounds of demurrer, that no deed or other instrument creating the trust was set out, and that it was not shewn sufficiently, or with certainty, that the monies were vested in them as trustees. Joinder in demurrer.

*Kelly*, in support of the demurrer. The replication is insufficient, because it is not enough to allege nakedly, that the parties were trustees. Some matter, either of fact or of law, ought to have been alleged, by which the creation and nature of the trust would have appeared. It is clear that the replication is bad if there be any case in which the money which is held by a trustee can pass to his assignee. Now a banker is a trustee for his customer, yet the money in his hands will pass to his assignees. [*Patteson J.* There is no mixing of the monies here. At the time of the bankruptcy there was only a debt due to the bankrupt, which was easily distinguishable.] Suppose a security be taken in the banker's own name, can he say that the money which was so laid out belonged not to him, but to some *cestui que trust*? [*Patteson J.* Take the common case of money at a banker's, which is to be invested in some particular security ; if that be done the security does not belong to the party so investing it, but to the owner of the money.] The money here may have been in the order and disposition of the bankrupt, so as to have given him the apparent ownership of it, in which case it would have passed to his assignees.

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*Peacock*, contrà, was stopped by the Court.

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Lord DENMAN C. J.—The statement is quite sufficient between these parties.

PATTESON, WILLIAMS and COLERIDGE, Js. concurred.

Judgment for the Crown.

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ARKWRIGHT v. CANTELL.

Tuesday,  
Nov. 20th.

The King granted by a lease the lot and cope, and all his mineral rights in the soke of Wirksworth, to A., and by the same instrument granted to him the office of bar-master within the same, the duties of which cannot be discharged by the farmer of the dues:—Held, that as he was incapable of holding that office, the grant of it was invalid.

**DEBT.** The declaration stated that the plaintiff was lord of the King's Field, in the soke and wapentake of Wirksworth, in the county of Derby, and that as such lord he had an immemorial right to hold a customary court within the soke and wapentake called the Great Barmote Court, which was held before his steward for the time being, or his deputy, twice every year, about Easter and Michaelmas, to determine, among other things, all questions arising within the said lordship concerning the mines, groves, shafts, or mears of ground within the said lordship, according to the customs of the said lordship. At which Barmote Courts a jury of twenty-four honest and able men have been accustomed to be summoned, and to inquire of such matters and things as happened within the said lordship which belonged to the said Court; and to inquire into and to make such orders and awards as should be reasonable, according to the custom of the said lordship. A custom was then set out, which provided, that if any miner or any other person should keep lawful possession of any grove, shaft, or mear of ground, and any other person, by day or night, should cast in or fill up such grove &c., every such person should forfeit 10*l.*, one half to the lord of the field or farmer, and the other to the bar-master or steward, and pay the party injured so much as would make good the work again. It was then alleged that one *Job Bunting*, a miner, was lawfully pos-

sessed of a certain shaft at a mine within the lordship, and that the defendant, wilfully, unlawfully, and maliciously, cast in and filled it up, to the great damage of the said *Job Bunting*: that a great Barmote Court was held on the 7th April, 1834, before *W. E. Mousley*, the deputy to one *C. Clarke*, steward of our lord the king of the said Court of the lordship, upon the oaths of 24 jurymen, who duly inquired of and concerning the said filling up and casting in of the said shaft by the defendant, and ordered, among other things, that the defendant should pay the sum of 10*l.*, one half to the lord of the field or farmer, and the other half to the *barmaster or steward*, according to the custom. It was then averred that the plaintiff was the barmaster, whereby an action had accrued to him to recover the said moiety. The defendant pleaded, among other pleas, that the Court was not duly held, and that the plaintiff was not the barmaster.

On the trial at the Derbyshire Lent assizes, 1836, before Lord *Abinger* C. B., to prove the plaintiff's title a lease was put in, dated November 17, 1827, whereby the king, as lord of the Duchy of Lancaster, granted to the plaintiff the lot and cope, and the mineral rights belonging to the king in the soke and wapentake of Wirksworth, to hold for a term of years at certain rents. The king also granted to the plaintiff, in the same deed, *the office of barmaster*, with all fees, profits, commodities, and emoluments to the same belonging, to hold the said *office* for the term of 31 years, at the rent of 5*l.* a year for the said office. The lease contained a covenant by the plaintiff not to assign or grant the said office without the consent of the Chancellor of the said duchy for the time being. It was stated, but was not strictly proved, that it had been usual to grant the office of barmaster to the lessee of the lot and cope in this form. The defendant's counsel contended that either this lease conveyed merely the right of appointing the barmaster, and no such appointment had been made; or, if it conveyed the office itself, the grant was void; because the plaintiff

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being the lord and lessee of the lot and cope, was incapable of holding the office. His lordship reserved this point for the defendant, and the plaintiff recovered a verdict on the other issues. In the ensuing term *M. D. Hill* obtained a rule nisi to enter a verdict for the defendant on this issue.

Sir *J. Campbell A. G.*, *Balguy*, and *N. R. Clark*, now shewed cause. First, the lease conveyed the actual office of barmaster, and not merely the power of nomination and right of appointment. It was contended at *Nisi Prius* that this was like an advowson, but that is very distinct. An advowson does not carry with it the profits of the benefice; whereas all the fees, profits, and emoluments of this office are granted to the plaintiff. He cannot have them unless he is the actual officer. The second objection is, that the grant to the plaintiff is invalid, because being lessee of the lot and cope and lord of the King's Field, it is said that he cannot be the barmaster. It is assumed that his duties as barmaster would be inconsistent with his interest as lessee; but there is no necessary inconsistency. The barmaster is an officer of the crown, whose duty it is to determine the amount of dues payable from the miners to the crown. That is a ministerial duty, and he does not act as an arbitrator. He does not preside in the Courts, but they are held before another officer, who is the steward, or the steward's deputy; and the jury, though summoned by the deputy barmaster, are directed by the steward of the Court. [Lord *Denman* C.J. Can the steward set aside the jury so summoned?] Yes. [Lord *Denman* C.J. What is then to be done?] A new jury must be summoned by the same deputy barmaster to whom the precept was directed. [Lord *Denman* C.J. That is, by the same interested party.] The barmaster may appoint a deputy; in fact, he never does act in person. [*Patteson* J. He is not compellable to appoint a deputy; the lease contains no provision on that subject. Suppose he neglect to appoint a deputy?] In cases where he is interested, it is presumed that he must appoint a deputy.

But assuming that this office is incompatible with the plaintiff's situation as lord of the King's Field and lessee of the lot and cope, yet as it is granted last it is not void. The effect of that grant may be to render the former grant void: as in *Com. Dig. Officer* (B 6) it is said, and (1 *Doug.* 398, n.) is referred to, "The grant of an office to one who has another office incompatible, is not good, for the first office will thereby be void." [Lord Denman C. J. The lease of the lot and cope cannot be called an office.]

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*M. D. Hill*, with whom was *Humfrey*, in support of the rule. It may not be necessary for the Court to say that the grant of the office is void, because if the defendant's construction be right, that only the right of nomination and appointment was granted, it will be analogous to the grant of an advowson; then the difficulty arising from the conflict of interests will cease. [*Coleridge J.* If this be a judicial office, can the crown make such a grant of the right of nomination? Lord Denman C. J. In *Sir George Reynel's* case (a) it was resolved, that an office to which a trust is annexed cannot be granted for a term of years. The right of nomination would contain a trust.] Certainly, that objection arises. Again, a judicial officer cannot be the subject of a sale, by the 5 & 6 *Edw.* 6, c. 16; but here a rent is expressly reserved in respect of the holding of the office. That would be illegal if the rent is considered to be paid for the office itself, but not if it be for the right of nomination. If however it is to be taken that the actual office was granted, then the holding of the office is incompatible with that of the lordship of the field. The same person cannot be both farmer and barmaster, since the duties of the latter conflict with the interest of the former. The duties of the barmaster are explained in *Houghton's Complete Miner*, which contains a finding of the customs of those mines in 1665, and was admitted on the trial to be read for each party. The first article is this: "We say upon our oaths,

(a) 9 Rep. 95 a.



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that by the ancient custom of the mines within the soke and wapentake of Wirksworth, the miners and merchants at first *chose themselves* an officer called a *barmaster*, to be an indifferent person betwixt the lord of the field or farmer and the miners, and betwixt the miners and merchants; which barmaster, upon finding any new rake or vein, did (upon notice given by the miner) deliver to the first finder two mears of ground in the same vein: the which two mears of ground the miner is to have, one for his diligence in finding the vein, and the other for mineral right, paying the barmaster or his deputy one dish of his first ore therein gotten; and then the barmaster or his deputy is to deliver to the lord of the field or farmer one mear of ground in a new vein at either end of the aforesaid two mears, half a mear of ground; and then every one in such rake or vein one mear or more, according to their taking." How can the barmaster be an indifferent person between the farmer and the miner, if he and the farmer be the same individual? Again, the barmaster is to regulate the dish or measure which is to be used in the measure of the ore (Art. 17), and by that measure the farmer's lot is to be taken (Art. 12): so that the barmaster, if he be at the same time the farmer, has a direct interest in increasing the size of the measures, and thereby falsifying them. Various duties are prescribed by the Articles to be performed by the barmaster, the neglect of which is punishable by the payment of fines to the farmer. Such a punishment must be wholly nugatory in the present case. It is impossible, therefore, to say that the plaintiff can at the same time fill both characters.

Lord DENMAN C.J.—The office of barmaster is clearly incompatible with the lease of the lot and cope. As it is an office of trust and confidence, the difficulty arising from that incompatibility cannot be removed by the appointment of a deputy. The duty of the barmaster is, among other things, to measure out the ground between the parties; *i. e.* the miners and merchants on the one hand, and the

farmer on the other. Now it appears that by the same instrument the plaintiff has become the farmer, and is also made the barmaster. The latter, therefore, is not the invalid grant of an office, but it is the grant to a person incapable of holding it, on the ground of his peculiar interest. If two incompatible offices be granted by one instrument, there may be a difficulty in saying which will be void. But that is not the present case. The grant of the office is void, because the party to whom it is granted cannot in contemplation of law satisfactorily perform the duties attached to it, as he has a direct interest in violating them.

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PATTESON J.—It is clear that the farmer cannot perform the duties of barmaster. His appointment as farmer is not, however, vacated by the grant of the office of barmaster; for it is by no means established that the acceptance of an office incompatible with one previously granted, will operate as an avoidance of the latter. Indeed, in *Rex v. Patteson* (a) it was determined that the holding of the one office rendered the party so holding it incapable of accepting the second. The present is not, however, the case of two incompatible offices; but it seems to me that the duties which the barmaster has to perform, are such as shew that he cannot at the same time be the farmer. The barmaster must be an indifferent person, between the farmer and the miners. It is contended, however, that he may appoint a deputy, and act by him. But it is the first time I ever heard of a person getting rid of an objection to his incapacity for an office, by his alleging a power to appoint a deputy. Such an argument cannot apply; if the plaintiff be incapable of holding the office, any deputy to be appointed by him will be equally so. By some of the Articles it is provided that the barmaster shall be answerable to the farmer for his neglect. Can the deputy be answerable to the farmer, who is at the same time his master, in another capacity? It is manifest that in his character of servant of the farmer, he would have

(a) 4 B. & Ad. 9; S. C. 1 N. & M. 612.

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an interest quite inconsistent with the indifference which the barmaster ought to feel.

**WILLIAMS J.**—The doctrine of the acceptance of a second incompatible office avoiding the first, is not applicable here, because the taking of the lot and cope was not an office, but a beneficial interest: and that is the foundation of the objection taken to the plaintiff's title, because, having that benefit, he will, in his character of barmaster, be called upon to perform duties which will conflict with it: and the objection is not one which can be removed by the appointment of a deputy.

**COLERIDGE J.**—This is not the case of two offices, but the interest taken by the plaintiff as farmer renders him incompetent to be barmaster. The latter in effect decides disputes between the lord and the miners; for the course is, that the deputy barmaster selects the jury who are to decide them. So that the lord will appoint the deputy barmaster, who will appoint the jury who are to decide the question in which the lord is interested. No long usage is found here; all that was in evidence was the lease and the single appointment; but if there had been proof of any custom to make such an appointment as the present, according to *Wood v. Lovatt* (a), it would not have been valid. In *Rex v. Joliffe* (b), indeed, a custom for the steward of a court-leet to nominate persons to the bailiff to be summoned on the jury, was held good. But that was decided upon consideration of the particular nature of the court-leet, which all the resiants are bound to attend. And though *Wood v. Lovatt* (a) was there cited, it was not dissented from. The general principle is, that wherever the lord's interest is concerned, the lord shall not select the jury who are to decide the question. In that case *Lawrence J.* observed, that the authority cited from the Year Book, in support of the position, that the court-leet could amerce

(a) 6 T. R. 511. (b) 3 B. & C. 54; 5 C. 3 D. & R. 240.

for the lord's private injury, did not warrant it. For in effect the lord would be the judge of his own cause. So here the barmaster could not be indifferent in any case where the lord's interest is concerned. The plaintiff, therefore, had such an interest as prevented him from being the barmaster.

Rule absolute for entering a verdict on the sixth issue for the defendant.

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The QUEEN v. The Councillors of the Borough of DERBY.

Thursday,  
Nov. 22nd.

A Rule nisi had been obtained for a mandamus to two councillors of the borough of Derby, to administer to Mr. *Fluker* the declaration prescribed by the 5 & 6 Will. 4, c. 76, s. 50, he claiming to have been elected a councillor at the last election for that borough in November, 1836. It appeared that on the 26th December, 1835, the thirty-six councillors who are to be elected for that borough were duly elected. Two of the councillors so elected were afterwards chosen aldermen for the two wards, Castle Ward and Becket Ward, and in their places two other persons, named *Tunnickliffe* and *Lowe*, were elected councillors; the former for Castle Ward and the latter for Becket Ward. The two councillors who were elected aldermen had not the smallest number of votes of the persons elected in December, 1835, so as to have been the councillors to go out of office in November, 1836, under s. 31 of 5 & 6 Will. 4, but the council decided under that section, that *Tunnickliffe* and *Lowe* were to go out of the council; *Tunnickliffe* thereupon became a candidate for the place of councillor for Becket Ward, which returned two councillors, and at the election, on November 1st, *Gadsby* had the greatest number of votes, *Tunnickliffe* the next, and *Fluker* the smallest. Thereupon *Gadsby* and *Tunnickliffe* were declared duly elected, made the declaration under section 50, and were admitted into the offices of councillors. The present ap-

Where a person has been declared duly elected a councillor, and has made the declaration prescribed by the 6 & 7 Will. 4, c. 76, s. 50, and has been admitted into the council, the Court will not grant a mandamus to two councillors to administer the declaration to another person who claims to have been duly elected instead of the former.

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plicant now contended that *Tunncliffe* was ineligible, inasmuch as he did not go out of the council on the 1st of November, 1836, because he must either be taken to fill the place of the alderman who had not the smallest number of votes at the election in 1835, or that he came into the council on an extraordinary vacancy, in which case it was urged he was not within the 31st section. It was therefore contended that all the votes given to him were thrown away, and *Fluker* was the next in order, and ought to have been admitted instead of *Tunncliffe*. Cause was shewn against the rule in Trinity term last (a) by

Sir *J. Campbell*, Attorney-General, who contended that the election was perfectly valid; that *Tunncliffe* had duly gone out, and was properly re-elected, or at least that unless notice of his ineligibility had been given at the election, *Fluker* could not be admitted. But as the rule was not ultimately determined upon these points, the argument thereon is omitted. He then opposed the rule on the ground that as *Gadsby* and *Tunncliffe* had been declared duly elected, had made the declaration, and had been admitted, the office was full, consequently, although a *quo warranto* might lie, Mr. *Fluker* could not ask for a mandamus. *Res v. The Mayor and Corporation of Oxford* (b) was expressly in point.

*Whitehurst*, in support of the rule. It must be conceded that the office is full, but the present application is not to admit Mr. *Fluker* into the office, it is merely required that two councillors shall administer the declaration to him. That is a simple ministerial act, which will not decide the title, nor the right of the parties. The declaration must be made before a councillor can be admitted, Mr. *Fluker* therefore wishes to be put into such a situation as

(a) June 9th, before Lord Denman C. J., Littledale, Patteson, and Williams Js.  
 (b) 1 N. & P. 474.

will enable him to ask for admission into the council. The present application is analogous to the common case where a mandamus is sought for to swear in churchwardens, *Rex v. The Archdeacon of Middlesex (a)*, and the Court will grant a rule absolute in the first instance.

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*Cur. adv. vult.*

Lord DENMAN C. J. on this day delivered the judgment of the Court:—This was a rule nisi for a mandamus to two of the councillors of the borough of Derby to administer to Mr. *Fluker*, claiming to have been elected a councillor of that borough, the declaration prescribed by the 50th section of 5 & 6 Will. 4, c. 76. The case appeared to involve several questions certainly of considerable difficulty in the construction of that act of parliament, with respect to the time and manner of supplying extraordinary vacancies in the office of councillor, but it is not necessary to come to any decision upon those questions, inasmuch as the Court is of opinion that whatever view be taken of them this rule cannot be made absolute. The motion was made upon the ground of a supposed ineligibility in one of the other candidates, Mr. *Tunnickliffe*, who had more votes than Mr. *Fluker*, and was declared elected according to the form prescribed by the 35th section of the act, and has been admitted a councillor; the office therefore is full *in fact*, and the remedy to try whether it be full *of right*, is by *quo warranto*. The case is not like that of a disputed election of churchwardens, respecting whose office a writ of *quo warranto* will not lie, and there is no necessity to administer the declaration in order to enable Mr. *Fluker* to try the validity of Mr. *Tunnickliffe's* election. It will be time enough hereafter to consider whether such a mandamus as is now prayed for can be granted, if Mr. *Fluker* should succeed, by a proper course of proceeding, in ousting Mr.

(a) 5 N. & M. 494.

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*Tunncliffe*, and should afterwards meet with any opposition in making the declaration and being admitted into the office which he claims.

Rule discharged with costs.

DOE *d.* PLEVIN and NEWALL *v.* BROWNE and another,  
 Assignees of JOHN PLATT, a bankrupt.

*Saturday,*  
*Nov. 25th.*

*A.* demised lands to *B.*, and afterwards executed a deed of trust, whereby he conveyed all his property to trustees for the benefit of his creditors. After the execution of the deed of trust, a fiat of bankruptcy issued against *A.*

The trustees of *A.* informed *B.* of the conveyance, and required him to attorn tenant to them. He at first refused to acknowledge their title, but afterwards, on the request and representation of *A.*, paid to them one shilling by way of acknowledgment,

and subsequently paid the trustees the rent for the current half year. They then proposed to raise his rent; and on his refusing to pay any additional rent, gave him a notice to quit; whereupon he signed a memorandum, in which he agreed to give up the possession to them:—Held, under these circumstances, that neither he nor the assignees of the bankrupt, who defended as his landlords, were prevented from shewing, in an action of ejectment by the trustees, that they had no title in consequence of the bankruptcy.

**EJECTMENT** for a farm in Cheshire. On the trial before *Alderson B.*, at the last Chester assizes, it appeared that the defendants were the assignees of one *John Platt*, under a fiat in bankruptcy, which issued in November, 1836, and the lessors of the plaintiff were trustees under a deed of assignment executed by him in July, 1836, for the benefit of his creditors. The bankrupt contested the validity of the fiat. He had let the farm in question to his son *Joseph*, who had taken possession before the trust-deed was executed. After it had been executed, the trustees went to the farm with *John Platt*, and they informed the tenant that the farm had been assigned to them, and required him to attorn tenant to the trustees. He refused at first to acknowledge their title, but afterwards, upon the request and representations of *John Platt*, paid them a shilling by way of acknowledgment. In the subsequent September he paid them the half-year's rent due at Lady-day, but on their proposing to raise the rent of the farm, which he refused to assent to, he said they might have the farm if they liked. They then gave him a notice to quit, and he signed this memorandum:—

“ I agree with *W. Newall* and *J. Plevin* to deliver up the possession of the Holywell Farm at the usual times of giving

up the lands, and also to quit the house and premises at the usual times of giving up, to the above *W. N.* and *J. P.*; as witness my hand, this 19th September, 1836; making Mr. *Joseph Platt* allowance for such improvements as may be considered by two impartial persons of right.

(Signed) *Joseph Platt.*"

When the notice expired, he refused to give up possession, and the defendants defended the present action as his landlords. The substantial question raised in the cause was as to the validity of the fiat, which had however been tried in another action in the Court of Exchequer, where the present defendants had recovered a verdict, subject to the opinion of the Court upon the effect of the evidence. It was agreed that this cause should abide the event of the proposed application to that Court in respect to the title of the assignees; but it was contended, on behalf of the plaintiff, that the defendants, who represented *Joseph Platt*, were bound by his acts, and that he, having acknowledged the title of the lessors of the plaintiff, was estopped thereby, and therefore it could not be disputed in this action. The learned judge was of opinion that *Joseph Platt* was not concluded by any thing that had taken place, and directed the verdict to be entered for the defendants, giving the lessors of the plaintiff leave to move to enter a verdict for them if the Court should be of opinion that the defendants were concluded.

*J. Evans*, on a former day in this term, moved accordingly, when the Court took time to consider; and now

Lord DENMAN C. J. delivered the judgment of the Court.—This was an application to enter a verdict for the lessors of the plaintiff under the following circumstances. (His lordship here stated the facts of the case.) The contention in the cause was between the assignees under the assignment of July, 1836, and those under the fiat, who disputed the validity of that transaction. It was insisted, however, on the part of the former, that in this action that question was not open, and that the defendants, coming in to


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defend as the landlords of *Joseph*, were in no better condition than he; and that he, after the payment of the shilling, and signing the memorandum, was estopped from disputing the title of the lessors.

Supposing this question to be open, no dissatisfaction is expressed with the summing up or the finding of the jury; and the only point for us to consider is, whether the learned baron should have allowed the inquiry to be instituted. We are very clearly of opinion that he was right in so doing. No general rule, when rightly understood, is more important, or more strictly to be observed, than that which precludes the tenant from disputing the title of his landlord; and we may concede that in the present case the defendants stood in the same situation as *Joseph Platt*, and could avail themselves of no defence which was not open to him.

But he had not received his possession first from the lessors of the plaintiff, nor was any attempt made to question that title under which he had received possession. Assuming that the shilling was paid by way of acknowledgment, which we are informed by the learned baron was very questionable, still it was paid in the first instance upon the request and under the representations made by *John Platt*, and the memorandum signed only as a consequence of that payment, and upon the faith of the same representations. If, at the very time when *John Platt* informed *Joseph* of the assignment to the lessors, he had committed an act of bankruptcy, and that assignment, which he represented as valid, was in truth void, he was practising a fraud on *Joseph*; and no case has decided that it would not be open to *Joseph* to explain under what circumstances he made any attornment or other acknowledgment. *Gregory v. Doidge and another* (a) is a strong and direct authority to the contrary: there was both the fact of one shilling paid as an acknowledgment of *Doidge's* title, and an agreement with him, after a statement of the amount of rent, to depasture some of his cattle, in part payment of the rent. But this was done on the

(a) 3 Bing. 474.

representation of *Doidge's* brother, and in ignorance of a defect in his title; and the Court of Common Pleas was clearly of opinion that under these circumstances the plaintiff, not having come into possession under *Doidge*, might shew that he was not his landlord. Had even *John Platt* been the lessor of the plaintiff, it would have been open for *Joseph* to have shewn a cesser of his title before the day of demise, for that would have been consistent with the accepting possession from him.

Upon the broad principle, however, that it is always open to a party not guilty of laches to explain, and render inconclusive acts done under mistake or through misrepresentation, we think this inquiry properly gone into; and consequently there will be no rule.

Rule refused.

—◆—  
The QUEEN v. JOHN WATSON.

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**MANDAMUS.** The writ recited that one *Thomas Wybergh*, since deceased, was in 1809 duly appointed steward of the Court of Requests for the manor of Sheffield, by the Duke of *Norfolk*, lord of the said manor, under and by virtue of an act of parliament passed in the 48 *Geo. 3*, intituled, "An Act for regulating the Proceedings in the Court Baron of the Manor of Sheffield and Ecclesal, in the County of York;" and that he appointed the defendant as his deputy steward of the said Court, in which office he continued until October, 1827, when *Wybergh* died: that the defendant, as such deputy steward, received large sums of money, being the amount of debts, or instalments of debts, recovered by divers parties in the said Court. By a local act, the Commissioners of a Court of Requests were empowered to order debts, when recovered by its process, to be paid by instalments, and under such terms and conditions as might appear reasonable and just to them. They made an order whereby the payments were directed to be made to a person who was then the deputy steward of the Court. Payments were made to him, and in consequence of the plaintiffs not applying for them, a large sum had accumulated in his hands, when his principal died and he was removed:—Held, that the commissioners not having revoked his authority, nor issued any other order, a mandamus would not lie at the suit of the succeeding steward, to compel the late deputy to pay over the accumulations to such successor.

Held also, that the late deputy was not entitled to appropriate the money so deposited, as a set-off to certain advances made by him in the execution of his office.

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Court, amounting in the whole to the sum of 1095*l.* 10*s.* 8*d.*: that after the death of *Thomas Wybergh*, one *Hugh Parker* was duly appointed by the Duke of *Norfolk* to be steward of the said Court, and as such steward is entitled, under or by virtue of the said act, to receive from the said defendant the said sum of 1095*l.* 10*s.* 8*d.*, the property of the suitors of the said Court of Requests, and to hold the same for them: that the said *Hugh Parker* hath often requested the said defendant to pay to him the sum of 1095*l.* 10*s.* 8*d.*, to be retained by him as aforesaid, yet that he had neglected to do so. The writ then commanded the said defendant to pay over the said sum to the said *Hugh Parker*, for the use of the said suitors.

The defendant returned, that while he was the deputy steward, divers costs and charges were from time to time incurred in the course of conducting the proceedings in the said Court, and divers sums of money in that behalf became payable to the steward or deputy steward and bailiff of the Court, which from divers causes thereafter mentioned have not been paid or discharged: that the course of proceeding against defendants in the said Court was in the first place by summons, signed by the deputy steward, requiring the debtor to appear before the commissioners of the said Court, at a day therein specified: that the fee to the steward or deputy for issuing such summons, as well as the fee to the bailiff for serving the same, was paid to defendant by the plaintiff in each action, at the time of entering it in the books of the said Court: that the defendant was answerable for, and did every month pay the said bailiff all fees received by him for such bailiff, for serving such summonses: that after the hearing of each case, in which the plaintiff succeeded, an order for payment of the debt by the defendant in such suit was made, and a printed order issued from the said Court, with a duplicate to file, informing the defendant thereof, and when and by what instalments he was to pay the same; upon issuing of which order, the steward or his deputy was entitled to another

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fee, as was the bailiff for serving such orders: that when a defendant neglected to pay the debt found to be due, a warrant was issued against the person or goods, authorizing the bailiff to take the person or goods; for which warrant additional fees became payable to the steward or deputy steward and bailiff, which fees ought to have been paid by the defendant, in addition to the debt: that in numerous cases, by reason of the defendants, against whom such warrants issued, dying or absconding, such orders were never served or the warrants executed, whereby and by reason whereof the defendant never received the fees to which he was entitled; and in many other cases, although these orders were served and warrants executed by the bailiff, yet the defendants could and did, by virtue of the said act, go to prison, and there remain for a certain length of time, regulated by the amount of the debt owing, according to the provisions of the said act, by which means they discharged themselves from payment of the fees due to the deputy steward and the bailiff, to whom the defendant was responsible for all fees to which he was entitled for serving orders and executing warrants issued by him, and that he actually paid or allowed to the bailiff, monthly, all fees to which he was entitled, although, for the causes and reasons aforesaid, he never did or could obtain a very considerable portion of those fees from the parties who ought to have paid the same: that in consequence of the great uncertainty which always existed as to defendants remaining in prison in discharge of their debts and the fees aforesaid, and of paying the same, it was not possible to come to any definite balance of accounts between the defendant and the bailiff: that a considerable amount, exceeding the sum now claimed by the present officers of the Court, or the commissioners thereof, is now remaining due to the said defendant, in respect of fees to which he is entitled, in respect of issuing such orders and warrants. And further, that from time to time orders were issued out of the said Court, with duplicates thereof, directing the defendants to pay their debts

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by instalments, and requiring that the different instalments should be paid into the hands of the deputy steward of the Court, for the use of the plaintiffs; and which orders are kept in printed forms, of which the following is a copy, and filled in with the names of the plaintiff and defendant, and the sums ordered to be paid, as occasion required:

" Court of Requests for the Manor of Sheffield.

" Thursday, the            day of            184 .

" Ordered, that            do pay to *the deputy steward* of this Court, at the Town Hall, Sheffield, for the use of            the sum of shillings and            pence, debt and costs, in manner following; that is to say, the sum of            shillings, on Monday, the            day of            and            shillings every three weeks afterwards, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon, until the whole of the said debt and costs shall be satisfied. And it is further ordered, that upon default of payment of the said debt and costs, or any part thereof, in manner aforesaid, that execution do immediately issue for the said debt and costs, or so much thereof as shall remain unpaid.

By the Court,

*John Watson.*

" *Note.*—The defendant is to bring with the first payment the fee allowed by the act of parliament for paying money into the Court, and also this order with that and every other payment."

That the monies received by the defendant from defendants under such orders, were held by him for the use of the plaintiffs, and that the defendant was personally responsible to the said plaintiffs for the due payment thereof to them; and that the accumulation of monies in his hands has arisen in this manner, to wit: that in many cases, after one, two, or more instalments, or in some instances where the whole of the debt had been paid to the defendant, in pursuance of the orders of the said commissioners, the plaintiffs died, and no executors, administrators, or other representatives of such deceased persons, demanded or required payment of the monies so received by him for such deceased plaintiffs. And further, that in many other cases, although the whole debt, as well as costs attendant upon the recovery thereof, were paid to him by the respective defendants, either from negligence, forgetfulness, or other causes, the debts so recovered and received by the defendant were not

nor have been claimed either by the plaintiffs, their executors, administrators, or any other person whomsoever, save and except the present steward of the Court and his deputy, and the commissioners thereof. And further, that the monies now remaining in the defendant's hands consist of those sums which from time to time have been paid to him, in his capacity of deputy steward, and have not been claimed by the plaintiffs.

Upon this return being filed, the prosecutor moved for a peremptory mandamus, and a concilium having been obtained, on a former day in this term,

*Alexander* argued against the return (a).—This case depends upon the construction of the 48 Geo. 3, c. ciil. (local and personal). By section 9, the lord of the manor of Sheffield is empowered to nominate and appoint a steward, bailiff, and other officers. By section 11, the steward is authorized to appoint a deputy steward, removeable at his will and pleasure, as, according to section 14, the steward, bailiff, or other officer, is removeable at the will and pleasure of the lord of the manor. Section 28 enacts that the commissioners may enforce their decrees by an award of execution against the body or goods of the party against whom the order is made; and they are also empowered to adjudge that the payment of debts shall be made by instalments. By section 30, the steward is to indorse on every precept of execution the sum of money and the costs decreed to be paid; and if they are paid or tendered to the steward, or his deputy, together with his fee for the trouble of receiving the same, the execution shall be superseded. Then section 36 prescribes what fees shall be taken, and sets them out in a table. Among others payable to the steward is a fee for "paying money into Court, and entering same in his book," which is authorized by section 56. Then section 57 provides, that for the purpose of defraying

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(a) Nov. 15th, before Lord Denman C. J., *Patteson, Williams and Coleridge* Js.

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the expenses incident to and attending the passing of the act, the commissioners may borrow money; and for raising a fund for paying off such sum of money as shall be borrowed, and the interest thereof; and also for providing from time to time for the necessary expenses of fire, coals, candles, and cleaning the court houses, and for other necessary and proper purposes, the steward of the Court may deduct and detain out of the monies to be recovered for the plaintiffs in any suit, certain specified sums, which sums the steward is directed to keep an account of, and pay over from time to time, to any five or more of the commissioners assembled in Court, for the purpose of applying the same as thereafter mentioned, that is, in liquidation of the debt or interest, and the remainder shall be applied by the commissioners, or by the steward, for the incidental expenses attending such Court as aforesaid. The legislature has thus contemplated one fund, which is to be created, and it may be reasonably considered that they must have intended that any other fund should be disposed of in the same manner, and by the same persons. Here is a fund raised, and now in the hands of *Mr. Watson*, which is not specifically appropriated. It cannot be contended that he is to keep the money for himself, and for his own benefit. Whatever he has received, he has so received in his capacity of officer of the Court, and he must be responsible to that Court for his conduct. Who then is entitled to the custody of this money? No one can make out a title but the commissioners or the steward. And the latter is the person who appears entitled to receive it. If so, this return discloses no answer to the demand of *Mr. Parker*, the present steward. It is said that *Mr. Watson* has paid sums of money which have never been refunded, and has paid the fees to the bailiff, and never been repaid. Such latter payments were clearly voluntary payments, for there is nothing in the act which requires the steward to pay the bailiff's fees; and as to the former, *Mr. Watson* cannot be justified in setting off the losses which he may have sustained in

other instances, against the claim made for money in his hands by any individual suitor, and if not, he cannot on that ground oppose the demand of the present steward, who claims the money on behalf of the general body of the suitors.

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*Crowder*, for the defendant. This return is a sufficient answer to the mandamus. The present steward of the Court has no right to claim this money, either personally or as trustee for any other person. No suitor demands that the money should be paid over to him, neither is there any public duty which requires it. The commissioners might probably have exercised a control over it, but the steward cannot establish any title to it. In fact the money arises from the accumulation of monies paid to the defendant for the use of the different suitors of the Court, and to them he is responsible for the amount. Any one of them may call upon him for the sums paid on his account, and if he do not pay them over, he will be liable to an action. This Court will not grant a mandamus, if the defendant will be put in peril of an action by obeying it. Neither will a mandamus lie where there is any other remedy. Here, if the argument on the part of the crown be correct, the defendant is committing a breach of duty in withholding the money from his successor. He may therefore be sued in an action on the case, and damages will be recovered from him. He is not, however, violating any duty in retaining the money in his possession, and if it be not claimed by the suitors, it will be but a slight reimbursement of the losses which he has sustained.

*Alexander*, in reply. The money was ordered to be paid to the deputy steward by name, he held therefore, like a stakeholder, for the benefit of the parties entitled to it. But the deputy steward is an officer of the Court, and therefore whatever has been received by him in that character must properly pass to his successor. Then as he re-



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fuses to pay this money over, mandamus is the proper remedy. It is said that an action may be brought against him, but no action can be maintained against him. [*Patteson* J. Why not against him as well as against the sheriff?] He is a public officer, and would not be liable to an action after payment over to his successor; *Gidley v. Lord Palmerston* (a). Such payment would be an answer to any action by a suitor. And it cannot be contended that the commissioners, or Mr. *Parker*, the present steward, can maintain any action against the defendant, to enforce a payment to them or him. [Lord *Denman* C. J. The commissioners have directed the money to be paid to Mr. *Watson*. Is not that money under their control, and can it be paid over to any other person without a specific order?]

*Cur. adv. vult.*

Lord DENMAN C. J. now delivered the judgment of the Court.—This was a mandamus to the late deputy steward of the Manor Court of Sheffield, to pay over the sum of 1095*l.* 10*s.* 8*d.* to the present steward. The former steward, by whom defendant was appointed deputy, is dead, and the application is made by his successor.

This sum is the aggregate of debts paid into Court by numerous debtors, for the benefit of the creditors who sued them, for whose use they were paid from time to time into the defendant's hands, under an order of the Court.

Both on shewing cause against the rule nisi, and on the argument respecting the legality of the return, the defendant's case came before us with some degree of prejudice, from his appearing to claim a right to set off certain advances that he had made in the execution of his office against the money in question: a claim utterly unfounded, as he holds the money in trust for the several creditors, and is bound to pay it to them whenever they demand it.

(a) 3 Br. & B. 275; S. C. 7 Moore, 91.

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We were also at first disposed to think that these sums came to the defendant's hands as an officer of the Court, in the terms of the writ, and that he must be bound, on quitting his office, to deliver them to his principal successor. But, on consideration, we do not think this view correct. The Court derives its power from a local act, of which the 28th section enables it to order debts, when recovered by its process, to be paid by several payments or instalments, and under such terms and conditions as may appear reasonable and just to the said commissioners, for the ease of defendants and security of plaintiffs. There is no other provision for disposing of the debts when obtained, and it is under this that the commissioners issued the form of order set forth in the defendant's return, which might have directed payment to any person, and did require it to be made to the deputy steward, for the use of the plaintiffs.

Mr. *Watson* then being the person described as deputy steward, has received the sums in question to the use of the creditors, not merely by virtue of his office, but because he answers the description in the Court's order. He is liable to them for the same, at least till his authority is revoked. But the commissioners have made no other order on the subject. For all that appears they may have abstained from doing so, because they prefer leaving the monies in the hands of the defendant, to directing them to be placed in any other hands. The steward then who applies for the mandamus, and can only entitle himself to it by virtue of the 28th section, does not bring himself within that enactment.

Rule discharged.



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A plaintiff in ejectment having recovered a judgment, sued out a writ of possession after the lapse of more than a year, without having issued a *scire facias*, and obtained possession of the land. The writ of possession was set aside by a judge at chambers, but the lessor of the plaintiff refused to give up the possession. A rule nisi having been obtained for a writ of restitution, the Court, on the argument of the rule, refused to grant that writ, but ordered the lessor of the plaintiff to deliver up the possession to the defendant.

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**THIS** was an ejectment by the mortgagee against the heir at law of the mortgagor, which was commenced in 1833, and was tried at the Spring assizes for Northamptonshire in 1834, when a verdict passed for the plaintiff, and judgment was signed in the ensuing Michaelmas term. A writ of possession issued soon afterwards, but was not executed. In June, 1837, the lessor of the plaintiff issued another writ of *habere facias possessionem*, under which the sheriff gave him possession. This writ was set aside by *Williams J.* on the ground of irregularity, the judgment not having been revived by *scire facias*. The order contained no directions to restore the possession, and the lessor of the plaintiff, though abandoning the writ, refused to give up the possession, alleging that he, being mortgagee, had a legal title to the land. On a former day in this term a rule was obtained, calling upon the lessor of the plaintiff to shew cause why a writ of restitution should not issue to the sheriff of Northamptonshire, commanding him to restore the possession of the lands so seized by virtue of the above writ, and why all further proceedings upon such latter writ should not be stayed,

*Warren* now shewed cause. This rule cannot be made absolute. The Court cannot award a writ of restitution so long as the judgment remains unreversed and in force. In *2 Lill. Pr. Reg. 577*, it is said, that "Restitution is a writ which lies where a judgment is reversed by writ of error; and the Court which reverses the judgment gives, upon the reversal, a judgment for restitution; for note, a *sci. fa. quare restitutionem habere non debet*, reciting the reversal of the judgment and the writ of execution and the return thereof filed, must issue forth." According to the same authority, the writ must be grounded upon some matter of record, and is not properly granted but where the party

cannot be restored by an ordinary course of justice. [*Patteson* J. What remedy has the defendant here?] He may bring an ejectment, or proceed by attachment for contempt of the judge's order, though he would not succeed in either course. The form of the writ, as given in *Tidd's Appendix*, p. 763, 4th edition, alleges that the *judgment* was irregularly obtained, and that the writ of possession *thereupon* issued improvidently and unjustly. But no such allegation could be made in the present case. In *Doe d. Williams v. Williams* (a), indeed, where a writ of restitution was obtained by a defendant, the judgment was set aside by the Court as irregular. [*Coleridge* J. How can the lessor of the plaintiff be allowed to retain the possession which he obtained by an irregular writ? The present application may be erroneous, but the rule may be moulded by the Court.] The defendant cannot vary the terms of the rule to such an extent. He has asked for a writ of restitution, and has no right now that cause is shewn to seek some other redress. But the Court ought not to grant possession to the defendant. The lessor of the plaintiff has a clear right to the possession, which he has now obtained, by an irregularity in the practice of the Court it is true, but still the land is his own. He has recovered his term by the judgment, and may enter without any writ of *habere facias possessionem*, if he will take upon himself the risk of entering upon the right lands. The sheriff's assistance is merely to preserve the peace. [*Patteson* J. Have you any authority for that position?] *Runnington's Ejectment*, p. 475, ed. 1820, and 2 *Sellon's Practice*, p. 202. But independently of those authorities, upon general principle the lessor of the plaintiff may retain the possession to which he is entitled, having acquired it peaceably, against the defendant, who has no right to it. This is supported by *Taylor v. Cole* (b), *Taunton v. Costar* (c), and *Turner v. Meymott* (d). It is quite immaterial by what means he obtained the possession, if they were not acts of violence.

(a) 2 A. &amp; E. 381.

(b) 3 T. R. 292.

(c) 7 T. R. 431.

(d) 1 Bing. 158.

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*Waddington* in support of the rule. The judgment not having been revived by a *scire facias*, the writ of *habere facias possessionem* issued improperly, and has accordingly been set aside. But the lessor of the plaintiff cannot be allowed to retain the possession that he obtained under colour of the process of this Court. In *Goodright v. No-right (a)*, a writ of restitution was awarded to restore a possession which had been improperly obtained. [*Cole-ridge J.* There the judgment had been set aside.] In *Withers v. Harris (b)* the proceedings were the same as in the present case, and a writ of restitution was awarded. But if such a writ cannot be awarded, the Court have power to give substantially the same remedy to the defendant upon the present application.

LORD DENMAN C. J.—Though the writ of restitution cannot be awarded, I think this rule may be moulded so as to meet the circumstances of the case. Here is a judgment on which the party obtained an irregular writ of possession, which has since been set aside; but that writ enabled him to get into possession with the appearance of the authority of this Court. He cannot retain the possession which he so obtained.

PATTESON J.—It must not go forth that a party may, after having recovered in ejectment, take possession of the lands of his own act, and without the authority of the Court. I do not assent to any such doctrine.

COLERIDGE J.—This is very different from the cases cited, where there was no title whatever to the possession.

Rule absolute for the lessor of the plaintiff to restore possession of the lands &c., taken possession of by the sheriff under a writ of *hab. fac. poss.*, set aside for irregularity, without costs.

(a) Barnes' Notes, 178.

(b) 2 Ld. Raym. 806.

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## COOK v. COOPER.

A WRIT of capias, indorsed to take "bail for 179*l.* by affidavit," issued to the sheriff of Kent, upon which the defendant was arrested, and gave a bail-bond to that amount. The sum actually sworn to in the affidavit to hold to bail was 175*l.* only. *Humfrey* had obtained a rule nisi for cancelling the bail-bond and entering a common appearance; against which,

Where, in the affidavit to hold to bail, the sum sworn to be due was less than that indorsed upon the writ of capias, and a bail-bond was given in the latter sum, the Court ordered that the bail-bond should be cancelled, and that the defendant should enter a common appearance.

Sir J. Campbell A. G. now shewed cause. The writ was not altogether invalid, but was good for the amount sworn to, and the defendant was not bound to give a bail-bond in a greater sum. The 2 *Will.* 4, c. 39, Sched. No. 4, sets forth the form of the writ of capias, and among the indorsements which are to be set out on the writ is this: "Bail for £——, by affidavit." But that is a mere directory enactment, and therefore if that indorsement be wholly omitted, or there be any error therein, the writ will not be rendered irregular. Assuming, however, that the writ was void, this is not the proper application, as the defendant should not have given a bail-bond, but should have applied to be discharged altogether.

*Humfrey* contra. In 1 *Arch. Prac.* by *Chitty*, p. 123, it is thus stated: "By the 12 *Geo.* 1, c. 29, s. 2, the sum specified in the affidavit to hold to bail must be indorsed on the back of the writ, and the sheriff must take bail for such a sum, and no more. This provision was considered only *directory*, and not to have avoided the process when the sum sworn to was not indorsed upon it. But the form of the indorsement, as prescribed by the 2 *Will.* 4, c. 39, together with the wording of that act, shew that it is absolutely requisite there should be this indorsement." And the rule Mich. 3 *Will.* 4, No. 10, provides, that where any of the indorsements required by that act to be made

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have been omitted, the proceedings shall be deemed to be irregular, and not void. [*Patteson* J. It cannot be said that there is an omission here, since a sum is indorsed.] It must have been intended that the sum to be indorsed is that which is mentioned in the affidavit. If so the proceeding was irregular, and the present application is correct.

LORD DENMAN C. J.—It is difficult to say that the act of parliament has made any difference. This would have been bad before.

PATTESON J.—Before the late statute the provision was directory only, yet if a party indorsed a different sum on the writ from that inserted in the affidavit, it would have been irregular.

WILLIAMS J.—There is nothing to make the proceedings weaker than they were before the new act.

COLERIDGE J. concurred.

Rule absolute.

—◆—

BRODERICK v. HOLLINGSWORTH (a).

To a declaration on a policy of insurance on a ship for 12 months, which alleged

**ASSUMPSIT** on a policy of insurance upon the ship Angerstein, at and from any port or ports, place or places,

(a) This case was decided in Trinity term last, May 26th.

a loss by the perils of the sea, the defendant pleaded, that during the time the ship was insured, and before the loss, the ship was greatly broken, shattered, and unseaworthy, but the same, by reasonable care and diligence, and for a small cost, might and could and ought to have been repaired by the plaintiff, and rendered seaworthy; yet the plaintiff, well knowing the premises, neglected to repair the ship, and she remained unseaworthy until the loss.—Held, that the plea was bad on demurrer, because, even if gross negligence on the part of the captain and crew and the ship-owner, through which the loss occurs, be a defence to an action on the policy, still this plea did not disclose any knowledge on the part of the assured of the unseaworthiness or shew the power of repairing the ship, nor did it appear that the loss occurred in consequence of such neglect.

*Quære*, whether such fact would constitute any defence?

The unseaworthiness which is implied in policies of insurance applies to the commencement of the voyage, and is not extended in time more than in other policies, to the continuance of the voyage.

whatsoever and wheresoever, for and during the term of twelve calendar months, commencing the 1st March, 1834; and the declaration alleged, that during the said twelve calendar months, and whilst the said ship was attempting to prosecute a voyage, to wit, on &c., the same was, by the perils and dangers of the seas, and by stormy and tempestuous weather, and the violence of the winds and waves, broken, damaged, spoiled, and destroyed, and was wholly lost to the plaintiff.

The third plea was, "that after the making of the said policy in the declaration mentioned, and during the said time the said ship was insured as therein mentioned, and before the loss in the declaration mentioned, the said ship was greatly broken, damaged, shattered, loosened, and unseaworthy; but the same, by and with reasonable care and diligence in that behalf, and at and for a very small cost and sum, as compared with the value of the said ship, might and could and ought to have been by the plaintiff repaired, amended, and rendered seaworthy; yet the plaintiff, well knowing the premises, did not nor would repair, amend, and render the said ship seaworthy, but wholly refused and neglected so to do, and she so remained and continued in such unseaworthy state and condition until the time of the loss in the said declaration mentioned." Verification.

To this plea the plaintiff demurred specially, on the ground that the plea did not aver the loss in the declaration to be in anywise caused by the plaintiff's not repairing &c. Joinder in demurrer.

*Martin* in support of the demurrer. This plea is bad. The warranty of seaworthiness which is implied in all policies, is satisfied by the ship being seaworthy at the commencement of the voyage; *Eden v. Parkison* (a), per Lord Mansfield C.J. in *Bermon v. Woodbridge* (b), *Watson v.*

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(a) 2 Dougl. 732, a.

(b) 2 Dougl. 789.



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*Clark (a)*; and it is of no consequence that she becomes unseaworthy during the voyage; therefore the plea is bad in substance. It is also defective in other respects. It does not appear that the loss happened through the alleged unseaworthiness. [*Patteson J.* *Non constat* that the vessel did not become unseaworthy through some one of the very perils insured against.] Again, the plea admits a partial loss, and as under an allegation of a general loss, a partial loss may be recovered (*b*), there is no answer to the whole action, and the plea is pleaded to the declaration generally. Thirdly, the plea alleges no obligation on the plaintiff to repair the vessel. The policy contains no stipulation upon the subject, and no custom or usage is set forth in the plea requiring the assured to repair during the voyage. No doubt cases have arisen where an inquiry has been made into the circumstance of the non-repair of a ship during the voyage; but there it has been for the purpose of determining whether the loss is to be considered as general or partial.

*R. V. Richards* contra. It appears that this was a time policy, and therefore it was the duty of the ship-owner to keep the ship in a seaworthy condition during the whole period. It must be considered that he enters into an implied contract with the underwriter to repair from time to time while the voyage continues, and when the necessity requires. Hence the unseaworthiness results in the present case from the plaintiff's breach of contract, and the loss, whether partial or general, is to be attributed to his own default. It cannot be allowed that the ship-owner should neglect all reasonable care and diligence, and suffer the ship to be lost for the want of supplying the repairs which he has the means of affording. The plea expressly alleges that the plaintiff could and might have repaired the ship. If there was any thing which prevented him, he might have traversed that allegation, or might have

(a) 1 Dow's P. C. 336.

(b) See 2 Wms. Saund. 203, n. (18).

shewn an excuse in the replication. In *Law v. Hollingsworth (a)*, a vessel was lost in the river Thames which had been insured on a voyage from Stettin to London. It appeared that she had no pilot on board when she came up that river, and the Court held, that the want of a pilot constituted such gross negligence on the part of the captain as to prevent the ship-owner from recovering in an action on the policy. The want of a pilot, when navigating in certain places, is a species of unseaworthiness, and consequently in that case it appears that the want of seaworthiness occurred during the voyage; for it was not contended that the ship was not seaworthy at the commencement of the voyage from Stettin. No doubt the assured *prima facie* has fulfilled his contract, if it be shewn that the ship is seaworthy when she sets sail on her voyage, but he is not at liberty to neglect her condition afterwards. [*Patteson J.* In that case there was, if I may so say, an intermediate voyage created by the act of parliament, which requires a certain part of the whole voyage, namely, that in the river Thames, to be under the protection of a pilot. The ship must be seaworthy during that particular voyage, and therefore must not commence it without a pilot.] It should rather seem that cannot be the ground of the decision; for suppose the vessel to be navigating the Elbe, the captain would be bound to take on board a pilot from Hamburgh, if the ordinary course of navigation required it.

*Martin*, in reply. The case of *Law v. Hollingsworth (a)*, if applicable, is met by the subsequent decisions of *Bush v. The Royal Exchange Assurance Company (b)*, and *Bishop v. Pentland (c)*, which expressly decide that where a sufficient crew has been provided by the ship-owner, the underwriters are liable for a loss, the cause of which is traceable to the negligence of the crew: and that is just,

(a) 7 T. R. 160.

(b) 2 B. &amp; A. 73.

(c) 7 B. &amp; C. 219; S. C. 1 M.

& R. 49. See also *Walker v. Maitland*, 5 B. & A. 171.

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for the ship-owner has no control over the captain and crew when they are at sea. According to the defendant's present argument, reasonable care is a condition precedent to the recovery by the assured; but there is no authority for such a proposition. [Lord Denman C.J. Do you contend that gross negligence during the voyage will in no case operate to prevent the assured from recovering?] In *Busk v. The Royal Exchange Assurance Company* (a) there was very great negligence, for all the crew had left the ship, and she was burnt in their absence, yet the assured recovered. As to the case cited respecting the want of the pilot, it is the same as though the ship had sailed without a competent crew on any voyage undertaken during the period for which the policy extends; and so far the remark of the present case being that of a time policy is applicable.

Lord DENMAN C.J.—The defence of unseaworthiness has generally been set up where it occurred at the commencement of the voyage: that, however, is not the case here; nor does the plea state the loss to have occurred in consequence of the want of seaworthiness. I feel some degree of doubt whether, if it had been distinctly averred, that by reason of gross negligence on the part of the ship-owner or captain the ship became unseaworthy and thereby was lost, it might not have been a defence. It would be a new, and at the same time a dangerous defence to set up; still, if it were made out, it might be an answer, as shewing that the loss was not by the perils insured against. But in the plea before us it is averred, that by reasonable care and diligence and for a very small cost the vessel might have been repaired by the plaintiff and rendered seaworthy. Now, in the first place, it is not distinctly averred that the plaintiff knew the precise state of the ship and its dangerous condition; and, secondly, the plea is defective in not stating that the repairs could have taken place before the loss

(a) 7 B. & C. 219; S.C. 1 M. & R. 49.

happened. Then there is no such averment of gross negligence as would bring the case within the principle to which I have referred, supposing the law to be as I have suggested; on which, however, I entertain some doubt, on account of the novelty and the danger of the defence.

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LITLEDALE J.—The implied warranty of the seaworthiness of a ship has not been held to extend beyond the time of the commencement of the voyage. If, indeed, some short time afterwards the ship is found to be unseaworthy, a question of fact arises as to whether she was really seaworthy at the commencement of the voyage. Or if by the default of the captain and crew, or of the ship-owner, she become unseaworthy during the voyage, and that fact be known to them, and the loss happens by reason of that want of repair, I am not prepared to say whether the assured could or could not recover. But the only material fact alleged in this plea is, that the ship afterwards became unseaworthy. As to the rest of the plea, wherein it is alleged that she became damaged, shattered, and loosened, the allegation amounts to nothing, as it is only a mode of stating what might be but slight damage. The material allegation, I repeat, is, that she became *unseaworthy*. It is not alleged that the plaintiff knew of the damage, or that it could be easily repaired, for the mere introduction of the words “well knowing the premises,” is not sufficient. So that in fact the plea comes to this: if, during the voyage, the vessel, without the knowledge of the captain and the crew or the ship-owner, became unseaworthy, and a loss ensue, unconnected with the want of seaworthiness, there would be an answer to an action on the policy. That cannot be the law. The fact that this was a time policy can make no difference. Many trading voyages last longer than it is contemplated at first. But as to them the vessel must be seaworthy and competent to perform such a voyage as she is to sail upon at the commencement of the voyage, and that is all which is required from the ship-owner. It

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does not appear here that the plaintiff knew of the unseaworthiness, and if he did I do not think that there would be a defence.

PATTESON J.—I think this is a bad plea. The defence is put on the ground of unseaworthiness. But the plea does not state that the loss happened through the neglect of the ship-owner to do repairs from time to time, though I do not know that it would have afforded any defence if it had. (His lordship here read the plea.) It omits to show how the loss actually arose. Now the implied warranty of seaworthiness contained in the policy of insurance is satisfied, if the ship, at the commencement of the risk, be seaworthy; and I am not satisfied that any distinction prevails between a time policy and a policy for a particular voyage. It may be necessary to consider the particular kind of unseaworthiness. For suppose there be an insufficient crew, at any time during the voyage, in which different kinds may be required in different parts, the case is very distinguishable from a defect existing at the commencement of the voyage. Therefore I should say that, supposing something to occur after the voyage has commenced, even amounting to neglect on the part of the ship-owner, and the loss can or cannot be traced to it, still the defence would not be on the breach of warranty, but on the neglect of the ship-owner. It is urged, indeed, that this warranty extends to the whole time of the voyage, whenever the ship-owner has an opportunity to put the ship into a proper state of repair. There is, however, no authority which shews that this is an answer to the action. There are other objections also to the plea. It is not alleged that the plaintiff was aware of the unseaworthiness at such time as that he could have repaired before the loss. And if in the case of time policies there is an implied warranty of seaworthiness during the whole period, the plea should have been framed to meet it. But I decide this case on the broad ground that there was no

warranty, except a warranty of seaworthiness at the commencement of the voyage.

Judgment for the plaintiff (a).

(a) *Williams J.* was absent.

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DOE d. REED v. HARRIS.

**EJECTMENT** for lands in Glamorganshire. At the trial before *Coleridge J.*, at the Spring assizes for that county, in 1836, the lessor of the plaintiff, who was the heir at law of one *John Reed*, proved the same facts as were established in the case between the same parties, reported in 1 N. & P. 405, and which are stated in the judgment of the Court hereafter. The premises in question in the present case however were copyhold. The learned judge left it to the jury to say, whether the testator did revoke his will, and intended to do so, and they found a verdict for the plaintiff. In the ensuing term, *J. Evans* obtained a rule nisi to enter a verdict for the defendant, or for a nonsuit, according to leave reserved; against which,

*Chilton* and *W. M. James* now (a) shewed cause. In the former case between these parties, the Court simply decided that the acts done by the testator could only be contended to amount to a revocation by burning, under the provision of the Statute of Frauds, and that there was not such a burning as would satisfy the words of that statute. There the dispute related to freehold lands, but in the present action the subject claimed is copyhold. Now

(a) Before Lord *Denman C.J.*, *Patteson*, *Williams* and *Coleridge Js.*

his intention to revoke his will:—Held, in an ejectment by the heir at copyhold property, that it was properly left to the jury to say whether done by the testator was an actual intended revocation of the will.

2. Held also, that the mere knowledge by the deviser of the will's having been preserved, and his not again attempting to destroy it or make another, were not of themselves evidence of a republication.

Thursday,  
Nov. 16th, and  
Friday,  
Nov. 17th.

1. At common law, a will may be revoked by any act of the testator which shews his intention, without the use of any words whatever.

2. Therefore where a testator threw his will on the fire, which was rescued from the flames, without his knowledge, by the devisee, so that though the wrapper was partially burnt, the will was not affected by the fire, and the testator expressed his displeasure, and declared he would make another will, but did not use any language declaratory of

law to recover what was then

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the Statute of Wills (32 Hen. 8, c. 1.) does not apply to copyhold lands, *Royden v. Malister* (a), *Carey v. Askew* (b); neither does the Statute of Frauds, *Tuffnell v. Page* (c), *Doe v. Danvers* (d), *Vawser v. Jeffery* (e), *Mortimer v. West* (f). The question therefore is, whether there has been a revocation of the will, according to the common law. It is contended for the plaintiff that there has. Now at common law there could have been no distinction between the revocation of a will of personalty or of realty, and it is submitted that the facts of this case would have constituted a revocation of the will, if the subject-matter of the devise had been personal property. A case lately occurred in the Prerogative Court of Canterbury, of *Walcott v. Ochterlony* (g), the facts of which were these: Miss *Ochterlony* having come to England from India, made her will, by which she appointed Captain *Walcott*, Mr. *George*, and Mr. *Ross*, her executors, and left it with Mr. *George*, in London. She went to live in Scotland, and being seized with a fatal disease, desired a lady with whom she lived to write to Mrs. *Walcott*, who was then at Bath, and direct her to have the will destroyed. This letter was written, and the testatrix destroyed a copy of the will which she had with her. Captain *Walcott* wrote to Mr. *George*, according to the instructions, who declined destroying the will, but proposed that it should be sent to Scotland. Miss *Ochterlony* expressed several times her wish that the will should be destroyed, and saw the letter which was written by her friend previous to its being sent, but died before the will was actually destroyed. Sir *H. Jenner* held that it was revoked. Now in the present instance there was, not merely a declared intention on the part of the testator to revoke the will, but also a direction to another to destroy

(a) 2 Roll. Rep. 383.

(b) 2 Bro. Ch. C. 58.

(c) 2 Atk. 37.

(d) 7 East, 299.

(e) 3 B. & Ald. 462.

(f) 2 Sim. 274.

(g) The case is not yet reported, but the reporters have been favoured by Dr. *Curteis* with a sight of the papers, and a copy of Sir *H. Jenner's* judgment.

it, and an act done by the testator, namely, the throwing it on the fire. The jury were well warranted in finding that it was revoked. Various examples are given in *Rolle's Abridgement*, Devise (O), of revocations of wills by the mere act of the party. Thus, pl. 4, "if a man devise land to one, and afterwards devise it to the poor of the parish, which is void, because they have no capacity to take, still this is a revocation; 29 *Eliz.*, *French's* case adjudged." So if he had devised it to a corporation, although the devise to them is not within the statute, still it is a revocation. [*Patteson* J. Is there any case in which it has been held that a will may be revoked by an act only, unaccompanied with words? In those cases from *Rolle*, there were two inconsistent writings.] It cannot be necessary to have any express declaration. Suppose a testator threw his will into the river, surely it would be held that he had revoked it, though it might be impossible to prove that he uttered at the time any words. [*Patteson* J. That would be a destruction of the will, though it might not be a revocation. I wish to know whether there is any case in which it has been held, that a will was revoked without some declaration, where the instrument has not been destroyed.] In *Rolle's Abr.* Devise (O), this case is stated, pl. 1: "If a man devise land under the 32 *Hen.* 8, by writing, and then revoke this by parol, in the presence of certain persons, requiring them to bear testimony of his present revocation, and says besides, that he will alter it when he comes to D., and before he comes there he is murdered, this will is revoked, although it was not in writing." And in 2 *Shep. Touch.* 409, it is laid down, that a revocation of a testament "is sometimes expressed and sometimes it is implied; for it is a rule, that *any act or thing done*, or words spoken by the testator, after the testament made, or that doth alter or cross all or part of his testament made before, is a revocation of it, or of that part;" and in p. 412, that "a good testament may be made void by the declaration of the testator's mind; as if a man have two testaments lying by

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him, the one made after the other, and they are both shewed or delivered to the testator when he lieth sick, and he by word or sign declare that he will have the former to stand, this declaration doth revoke the latter and affirm the former."

Maule, J. Evans, and E. V. Williams, in support of the rule. The question submitted to the jury was not simply whether the testator had revoked his will, but in substance it was whether he had revoked it *by burning*. Now upon that question the case of *Doe d. Reed v. Harris* (a) is a decision in favour of the defendant, because the Court there decided that the acts stated to have been done by the testator did not constitute a *burning* of the will; and they considered that the act of revocation was incomplete, in accordance with the previous decision in *Doe v. Perkes* (b). It is conceded that copyholds are not within the Statute of Frauds, but that case was not decided simply upon the construction of that statute. The argument now urged is, that the mere intention to revoke a will operates as a revocation of itself. But the law is not so; that intention must be evidenced by some complete act. Here, the evidence consisted merely of expressions of the testator, declaratory of some intention to revoke or alter his will, and this incomplete act of burning. The testator never declared an actual present revocation; and in this respect the case differs from that cited from *Rolle's Abridgement*, where the testator called upon the persons there present to attest his then revocation. A distinction has always been taken between words expressing a present and those of a future intention; the former have been held to operate as a revocation, but not the latter; *Cranvell v. Sanders* (c). [*Patteson J. In Burton v. Gowell* (d) it was held by the Court, that if a testator say "I *will* revoke my will," it is no revocation, but that if he say "It shall not stand," it is.] That a mere

(a) 1 N. & P. 405.

(b) 3 B. & Ald. 489.

(c) Cro. Jac. 497.

(d) Cro. El. 306.

declaration of an intention to revoke will not amount to a revocation, is also to be inferred from *Thomas v. Evans* (a). [*Patteson* J. What is to be said to the class of cases where a will has been held to be revoked by subsequent imperfect conveyances?]¹ There a present intention to revoke, exhibited by the testator's attempt to pass away the subject-matter of the devise, is inferred; 1 *Wms. Saund.* 278 (a), note (4). Assuming, however, that the will was revoked in this case, there is evidence to establish a republication. The testator knew that his will had not been destroyed, he knew that the defendant had preserved it, and talked about making another will, but he never did so, nor did he again attempt to destroy that which he is said to have revoked. Then according to *Brotherton v. Hellier* (b), and *Slade v. Friend* (c), a republication of the will might be inferred. Such inference would not be affected by the Statute of Frauds, for as this devise is not within it, for the purpose of revocation, so also it is not for the purpose of republication. That question ought therefore to have been submitted to the jury.

Cur. adv. vult.

Lord DENMAN C. J., in the ensuing Hilary term (Jan. 20th), delivered the judgment of the Court.

This was an ejectment for copyhold premises, by the heir at law of the person last seised, against one who claimed as his devisee. The plaintiff succeeded at the trial, but leave was given to the defendant to move for a nonsuit, or for a verdict in her favour. On discussing a rule granted in conformity to this permission, the question was, whether the will (admitted to have been duly executed) had been well revoked. The facts lie in a narrow compass; the testator was much under the influence of the devisee, who lived with him as his housekeeper; but according to the testimony of a witness, to whom the jury gave credit, he had frequent quarrels with her, often complained of her

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(a) 2 East, 488.

(b) 2 Sir G. Lee's Cases, 55.

(c) Before the Delegates, cited in *Brotherton v. Hellier*, ib. 84.

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behaviour towards him, and on one occasion, when irritated, he threw the will upon the fire; she rescued it without his knowledge, at which he expressed his displeasure when informed of it; the paper in which it was wrapped was thereby partially burnt, but the will itself was not affected by the fire. The devisee kept it until after the testator's death. These circumstances being established in evidence, the learned judge asked the jury, whether what was *then* done by the testator was an actual revocation of the will, and so intended by him. In another case, tried between the same parties, the same question had arisen, and upon the same facts, the Court was of opinion that the will was not revoked. That ejectment, however, was brought to recover *freehold* lands, and our decision proceeded wholly on the express enactment of the Statute of Frauds, the words of which I do not here repeat. There the will itself was not burnt; we therefore thought that the Statute prevented it from being revoked, and that no evidence whatever of what was said, proving an intention to revoke, could supply that deficiency. But the property now in question being *copyhold*, to which the Statute of Frauds does not apply, because it is not devisable within the Statute of Wills, the point is different, and must be treated as if the first-mentioned act had never passed; in that case, the law would have required clear evidence of a positive declaration of the intent to revoke at the time such declaration was made, or some act done with the intent thereby to revoke, and the jury would have had to determine whether, in fact, such declaration was made, or act done. Some doubt has been entertained whether any declaration would be sufficient without the word "*revoke*;" but upon full consideration, we think it impossible so to limit the testator's power of revocation, and that any equivalent word or words and expressions would be sufficient for that purpose. But further, we are now required to consider whether, without any language at all, a testator may revoke a will by the conduct he exhibits; and this appears to be tantamount to an inquiry, whether conduct *can* give a positive declaration of intent.

If it can, there can be no more necessity for words, than for the use of a particular expression. Now nothing is easier than to imagine such gestures and proceedings connected with the will, as must fully convince every rational mind, that the testator intended to revoke his will, and thought he had done so by the means he took for that purpose; but if he who has power to revoke by declaring a present resolution then to do so, does in fact make that resolution manifest, it seems clear that the act of revocation is complete in every essential part. This proposition is not inconsistent with any authority in our books. Any doubt that may rest upon it, may probably be the result of our habit of considering the subject since the Statute of Frauds. That law, one of the wisest in principle, though far from being complete in its detail, or fortunate in its execution, enacts certain formalities for giving effect to the revocation of a will, and the obvious good sense of that provision has, in some way, embodied itself with our ideas of revocation. But the law, with respect to wills not within that statute, is the same as it was before the statute. This use was made of our former decision between the same parties; the will was intended to be revoked by burning, but the burning was not complete, and the will was held not to be revoked—it follows, as the revoking act was not performed, that there was no revocation. But this is clearly a fallacy. Burning a will is one of the modes of revocation permitted by the Statute of Frauds. It follows that there must be a burning to some extent to satisfy the enactment; but this is a case of revocation at common law, which only requires evidence of intention; and that evidence may be found in an imperfect act, or a mere attempt. The duty then of the judge, in trying a question as to such revocation of a will, was to lay before the jury the facts proved, and ask, whether they amounted to a revocation; this was done on the present occasion. There was certainly evidence from which that inference might be drawn, and by which we think it was warranted. On this point, then, there is no ground for a new trial.

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There was one other argument which requires notice. The testator was aware that his devisee had taken the will off the fire; he expressed his annoyance that she had recovered possession of it, and his intention to make a new will instead of it; yet he took no further steps towards its destruction, or making a new will; he was therefore said to acquiesce in its continuance, and the revocation itself was said to be revoked and the will revived. This state of things might certainly exist, and if there was evidence of it, such evidence ought to have been submitted to the jury. But we cannot think the mere knowledge of the continuing existence *in specie* of a will intended to be destroyed, when accompanied with no wish to restore its efficacy, but on the contrary with great displeasure at its rescue from the flames, does constitute such evidence. The recent act for amending the law of wills (*a*) will probably prevent any future agitation of a case like the present, as the third section makes all property devisable, and the 20th and 22d describe the mode of revoking wills, and of reviving such as may have been revoked.

Rule discharged.

(a) 7 Will. 4 & 1 Vict. c. 26.

TAYLERSON v. PETERS and another (*a*).

1. Where a tenant of a farm gave up possession of the house to the incoming tenant (the land having been previously given up) a few days after the determination of the demise, and left a cow and some pigs on the premises without leave of the incoming tenant:—Held, that so doing did not constitute a continuance in possession so as to entitle the landlord to distrain under 8 Anne, c. 14, ss. 6 and 7.

2. *Quare*, where a distress had been made for rent in arrear by a party claiming as landlord, whether a ratification of the distress by the party really entitled, after plea pleaded, is sufficient?

(a) This case was decided in Trinity term last, June 1st.

the determination of the demise, and left a cow and some pigs on the premises without leave of the incoming tenant:—Held, that so doing did not constitute a continuance in possession so as to entitle the landlord to distrain under 8 Anne, c. 14, ss. 6 and 7.

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1830, and for which he paid the rent either to Mr. *Turton* or to his agent, Mr. *Peters*, till the year 1831. In that year the plaintiff received notice from a Mr. *Jenkyns*, that, by a deed of 1825, the legal estate of the farm which the defendant occupied had been conveyed to Mr. *H. Turton* and others, and that Mr. *Jenkyns* was thereby appointed receiver, and he directed the plaintiff to pay his rent in future to *Jenkyns* or his agent. This notice was indorsed with the following notice:—"The Lady-day rent and all arrears are to be paid to Mr. *Jenkyns*, or Mr. *Belcher* as his agent, at the Angel Inn in Whitby, on Saturday, the 2nd of June." The plaintiff accordingly paid his rent to Mr. *Jenkyns* or his agent. At Michaelmas, 1834, Mr. *Peters* caused a notice to quit at the usual times, in the spring, 1835, to be served upon the plaintiff; and the plaintiff accordingly gave up the arable land at Candlemas, and the pasture land at Lady-day; the house was to have been given up on the 13th May to the incoming tenant, whose term had commenced, but the plaintiff did not give it up till the 22nd May, and he then left a cow and some pigs on the premises, but without asking permission of the incoming tenant. On that day, after the plaintiff had given the incoming tenant possession of the house, and had left the premises, the defendants made a distress on the cattle left by the plaintiff, by virtue of the following warrant:—

"*John Kirby*,—I hereby authorize and empower you to distrain the goods and chattels of Mr. *Robert Taylerson*, on the premises which he now holds or lately held under *Edmund Turton*, Esq., situate in the township of Roxby, for the sum of 32*l.*, being rent and arrears of rent due to *Edmund Turton*, Esq., at Lady-day last.

George Peters,

"May 22nd, 1835.

Agent to *E. Turton*, Esq."

Upon this distress being made, the plaintiff went to Mr. *Belcher*, the agent of *Jenkyns*, and paid him the 32*l.* as rent due to Mr. *Jenkyns*. *Belcher* accepted the rent, and wrote to the defendants advising them to withdraw the dis-

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treass, and stating that he thought there was some irregularity. The defendants however proceeded to sale, and the distress produced 17*l.* 16*s.* The plaintiff thereupon (June 9th, 1835,) commenced the present action, and issue was joined in the Hilary term ensuing. On the 11th July, 1835, it appears that Mr. *Jenkyns* intimated that he would support the plaintiff in his action, but in February, 1836, he signed a recognition (a) of the distress.

Upon these facts it was contended, first, that there was no possession by the plaintiff to authorize a distress under the 8 *Anne*, c. 14, s. 6; second, that the authority to distrain being in *Jenkyns*, a recognition of the distress made by *Peters* could not be made after action brought. The jury found a verdict for the plaintiff, with 20*l.* damages; upon which his lordship directed that it should be entered for the defendants, with liberty for the plaintiff to move to enter it for himself with 20*l.* damages. A rule nisi having been obtained accordingly,

Cresswell and *Wightman* shewed cause in Trinity term last (June 1st). The 8 *Anne*, c. 14, ss. 6 and 7, enable landlords to distrain for rent arrear within six months after the determination of the lease, provided that the distress be made during the possession of the tenant from whom such arrears are due. It is true that if the possession of the outgoing tenant be entirely determined, and the incoming tenant be in occupation of the whole of the demise, the landlord cannot distrain, although the outgoing tenant may have left, by permission, stock on the premises. But it is clear in this case that the stock was not left on the farm by the license of the incoming tenant. The entire possession therefore was not given up. In *Nuttall v. Staunton* (b) it was contended that the tenant must be in possession of the

(a) There was a question at the bar whether this recognition was signed by all those who had the

legal estate under the indenture of 1825.

(b) 4 B. & C. 51; S.C. 6 D. & R. 155.

whole demise, and must hold over adversely in order to entitle the landlord to distrain under the statute; but the Court held that mere possession of any part of the premises was sufficient warrant to the landlord. *Beavan v. Delahay* (a) is to the same effect (b).

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Alexander and *W. H. Watson*, *contra*. It is quite clear that the possession required by the 8 *Anne*, c. 14, must be a *bonâ fide* possession, and unambiguous. The leaving a few articles on premises after possession has been given up, does not amount to keeping possession either in the legal or popular sense of the word. The stock of the plaintiff remained on the premises either wrongfully or by the leave and license of the incoming tenant. In the former case the plaintiff might have been liable to an action of trespass at the suit of the incoming tenant, but to nothing more. *Beavan v. Delahay* (a) and *Nuttall v. Staunton* (c) are clearly distinguishable, for in both those cases the relation of landlord and tenant continued to exist.

LORD DENMAN C. J.—Whether ratification could be given, after action brought, to a distress such as has been made in the present case, might require much consideration; but it is not necessary to examine into the point now, for I agree in thinking that in this case there was no possession by the plaintiff to warrant a distress. Undoubtedly if the cow and pigs had been left on the premises with a view of keeping possession, any slight thing of that nature would have been sufficient. But it would be quite unreasonable

(a) 1 H. Bl. 5.

(b) The main point discussed in argument was whether the ratification of the distress by *Jenkyns* and others, in whom was the legal estate, being after action brought, was sufficient. Note (4) to *Potter v. North*, 1 Wms. Saund. 347 c, and *Gilbert's Distresses*, 29, 4th edit.

were relied upon to shew it was sufficient. *Wilson v. Barker*, 4 B. & Ad. 614; *Hull v. Pickersgill*, 1 B. & B. 282, and the Year Book, 7 *Hen.* 4, p. 35, pl. 1, were cited *contra*. See Lord Denman's judgment above.

(c) 4 B. & C. 51; *S. C.* 6 D. & R. 155.

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to put such a construction on the facts here; for although the plaintiff stopped on the premises till the 22nd May, he gave up possession then, and he appears to have left the stock there without asking permission. Unless therefore the mere fact of leaving the stock on the premises constitutes possession, which I think it does not, the tenancy was determined.

LITLEDALE J.—I am of the same opinion. The different holdings of the plaintiff seem to have ended at different times; the possession of the house, which was the last, was to have been given up on the 13th May, and was actually given up on the 22nd May, before the distress was made. The possession therefore was determined.

PATTERSON J.—I quite agree that there was no possession by the plaintiff under the 8 *Anne*, c. 14. The possession, after the determination of the lease, may be of two sorts, either tortious or lawful. In *Beavan v. Delahay* (a) it was in pursuance of the custom of the country, and in *Nuttall v. Staunton* (b) by the permission of the landlord; but in all cases there must be a possession to the exclusion of other persons.

WILLIAMS J.—Nothing in the facts of this case indicates any possession whatever by the plaintiff.

Rule absolute (c).

(a) 1 H. Bl. 5.

(b) 4 B. & C. 51; 3 C. 6 D. & R. 155.



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SOWELL v. CHAMPION, NICHOLAS TOLMIE TRESIDDER,
and WHITE.

TRESPASS for breaking and entering plaintiff's dwelling-house, and taking his goods therein. Plea, by *Champion*, that within the manor of Penryn Forryn, in Cornwall, there now is, and from time whereof &c. hath been, a certain court of record, holden in and for the said manor, from three weeks to three weeks, before the steward of the said court, for the trying and determining of all personal actions and pleas of trespass on the case, arising within the said manor, to be commenced by plaint in the said court to be levied; that one *Robert Tresidder* levied a plaint in the said court against the said *Richard Sowell* (the now plaintiff), for causes of action arising within the jurisdiction, and such proceedings were thereupon had in that court; that *R. Tresidder*, by the judgment of that court, recovered in such plea against *Sowell* 11*l.* 18*s.* 8*d.* for his damages &c., as by the record &c.; that *R. Tresidder*, for obtaining satisfaction of the same, sued out of the said court, according to the custom thereof, a precept directed to the bailiff of the manor, and to the defendant *Champion* and two others, commanding them, and every and either of them, that of the goods and chattels of the said *R. Sowell*, within the said manor, they or one of them should cause to be levied the damages aforesaid, which the said *R. Tresidder* had

1. The application to a judge, in the course of a cause, to direct a verdict for one or more of several defendants in trespass, is strictly to his discretion; and that discretion is to be regulated not merely by the fact that at the close of the plaintiff's case no evidence appears to affect them, but by the probabilities whether any such will arise before the whole evidence in the cause closes.

2. Where goods are taken under process which is illegally executed, and the owner pays

a sum of money to release them, he is entitled to recover the amount so paid, and the measure of damages is not to be limited by the injury actually sustained.

8. The Court will not grant a new trial on the ground that the verdict, the amount whereof is under 20*l.*, determines a question affecting the interest of a large district.

4. Two attorneys issued a precept, on a judgment recovered in a local court, to the bailiff, and indorsed their names on it. They knew the residence of the defendant, and one of them sent him word that the levy would not be made on a particular day. The bailiff, while executing the levy, stated that he was employed by the attorneys. The levy was made; and the defendant's house being without the jurisdiction, he brought an action against the bailiff and the attorneys, who severed in their pleas, and pleaded the general issue and a justification under the process:—Held, that there was not sufficient evidence to shew that the attorneys authorized the illegal execution of the writ, independently of the special plea, and therefore that they were entitled to a verdict of acquittal on the general issue.

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recovered, and which precept, before the delivery thereof to *Champion*, was duly indorsed to levy the whole, with incidental charges, &c.; that the precept was delivered to *Champion*, who was the bailiff of the manor and an officer of the said court, to be executed; by virtue of which precept he, so being and as such bailiff, afterwards &c., peaceably entered into the said dwelling-house &c., the outer door being open, and the *said dwelling-house being then situate in the said manor, and within the jurisdiction of the said court*, in order to seize &c., and did then and there seize &c. the said goods, the same then and there being in the said dwelling-house, and within the said manor and jurisdiction, for the purpose of levying &c., and in so doing did necessarily &c., as it was lawful &c.; and that *Sowell* afterwards, and before the monies were levied, paid *Champion*, so being such bailiff, the said damages, whereupon he gave up the goods to *Sowell*, who accepted the same. Verification. Pleas, by *N. T. Tresidder* and *White*: 1, not guilty; 2, the same as *Champion's* plea, but adding to the statement of his entry as bailiff, that *N. T. Tresidder* and *White* entered as his servants and by his command, and stating the goods to have been relinquished by *Champion* and by them as his servants, and by his command, and with the consent and license of *Sowell*. Verification. The plaintiff in his replications denied that the dwelling-house in which &c. was situate within the manor and jurisdiction of the court.

On the trial before *Coleridge J.*, at the Cornwall Summer assizes, 1835, the plaintiff proved that *Champion*, who was the bailiff of a court at Penryn, called the Court of the Manor of Penryn Forryn, had levied upon certain goods of the plaintiff, under a precept out of the court, indorsed with the names of *Tresidder* and *White*, attorneys, living at Falmouth. The plaintiff lived in Penryn, and did not appear to have had any other house and goods than those where the levy was made. The defendant *Tresidder* was proved to have spoken to his brother, the plaintiff in the

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inferior court, respecting the execution, and to have sent word to the plaintiff that the levy would not be made on a particular day, as the defendant *Champion* was not at home, and *Champion*, at the time of the levy, said that he was employed by *Tresidder* and *White*. This being the plaintiff's case against them, their counsel applied to the judge for an acquittal, on the ground that there was not sufficient evidence of their having authorized the levy; but he refused to do so. They then proved the judgment against the plaintiff, and contended that as the precept, which had been issued on a regular judgment, directed the levy to be made within the jurisdiction, and the defendants *Tresidder* and *White* had given no specific direction to *Champion* as to where he should levy, they were then entitled to their acquittal. Evidence was also given to shew that the plaintiff's house was in fact within the jurisdiction of Penryn Forryn. The learned judge left it to the jury to say whether *Tresidder* and *White* had directed *Champion* to levy upon the plaintiff's goods in the house in question, and whether that house was within the jurisdiction; telling them that if they found for the plaintiff, they should assess the damages at 18*l.* 11*s.* 8*d.*, the amount which the plaintiff had paid to release the levy. The jury did find for him on both points, and found the damages as directed. The learned judge gave leave to move to enter a verdict for the defendants *Tresidder* and *White*, if the Court should be of opinion that there was no evidence to go to the jury of their having employed *Champion* to make the levy in this particular place. In the ensuing term

Crowder moved for and obtained a rule nisi accordingly; and he also moved for a new trial on behalf of *Champion*, on the ground of a misdirection with respect to the proper amount of damages. He contended that inasmuch as the plaintiff was clearly liable for the amount directed to be levied, and therefore the only damage resulting to him arose from the fact that the goods were taken in an impro-

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per place, the money paid by him to release them was not the proper measure of damages. The verdict also on the issue respecting the boundary of the jurisdiction was contrary to the evidence; and although the damages were below 20*l.*, yet as the decision affected a large district, he hoped the Court would depart from the usual rule on this point.

LORD DENMAN C. J.—On the first point there must be a rule. In regard to the last, even if we thought that the verdict was against the evidence, we cannot depart from the regulation which prevents a new trial from being granted when the damages are under 20*l.*, though extensive inconvenience may follow in the particular case. The direction as to the measure of damages was right. A person who takes upon himself to extort money by an authority which he does not possess, must repay the money which he raises thereby (a).

PATTESON J.—The circumstances of the present case are not such as to cause any mischief of themselves; but I am afraid of admitting the principle contended for, that where money has been extorted by means of an illegal authority, the measure of damages is to be merely the amount of injury actually sustained.

WILLIAMS J.—We should give effect to the illegal act if we allowed the party to estimate the damages as it is now proposed.

COLERIDGE J. concurred.

Rule nisi to enter verdicts for
Tresidder and White;

Against which cause was shewn, in Hilary term last (Jan. 21st(b)) by

(a) See *Doe d. Stevens v. Lord*,
ante, p. 604.

(b) Before Lord Denman C. J.,
Williams and Coleridge Js.

Erle and Butt. An attorney, who issues process illegally, is liable to be sued in trespass, as appears from *Barker v. Braham* (a), *Bates v. Pilling* (b), and *Bryant v. Clutton* (c). It is true that the writ in this case was regular, as it directed the levy to be made within the manor; and if the case had rested there, the attornies in the present instance would not have been liable. But if they caused the levy to be made in this particular place, they are liable jointly with *Champion* for that wrongful act. Whether they did so, was a question for the jury; and there was sufficient evidence to warrant them in finding the present verdict. There were the declarations of *Tresidder* and of *Champion*, who was acting clearly in concert with them; and the defendants must have known the situation of the plaintiff's house, and that he had no other. In effect therefore they directed the levy to be made in his house, whether it was within or without the jurisdiction. It was contended that at the end of the plaintiff's case there was no evidence to connect the attornies with *Champion*; but there certainly was some evidence to go to the jury, and the judge was not bound to direct an acquittal. Again, the defendants in their special pleas expressly justify, and thereby adopt, the act of *Champion*.

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Crowder and Barstow, in support of the rule. No case was proved against the defendants, *Tresidder* and *White*, beyond an act which was done in the ordinary course of proceeding. They indorsed a writ, and delivered it to the bailiff to execute, and, as far as they were concerned, he was to execute it legally. It would be a very serious decision, and most dangerous to the profession, if the attorney who delivers a writ to the sheriff or bailiff is to be made responsible for the subsequent acts of the officer, who may be guilty of any irregularity in the execution of the process. If the attorney personally interfere in the execution of the

(a) 3 Wils. 368.

(c) 1 Maa. & W. 408.

(b) 6 B. & C. 38; 9 D. & R. 44.

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process, he may indeed render himself liable for the acts of the officer, or if he issue process that is irregular (a) or void in itself. The cases cited all apply to this latter proposition. But it was sought to maintain the action against the attornies in the present instance by proving an active interference in the execution of the process. There was not, however, any evidence to support this attempt of the plaintiff. The names of the attornies were indorsed on the writ; but that was no more than is required by the rule of this Court (b) to be done on every ca. sa. issued out of it: and cannot render an attorney liable for the bailiff's act. Again, it is said that they must have known where the levy was to be made, and therefore must be parties to the levy in that place, which in the result was proved to be privileged from it. But how can the Court speculate upon the knowledge which the attornies might or might not have, or their real intentions, not disclosed by any act? The simple question is, did they direct the levy to be made in this particular place? The declaration made by *Tresidder* amounts to nothing, and that by *Champion* is not admissible against them, unless he were acting in concert with them; which is the very fact at issue. Then *Stokes v. White* (c) expressly decides that an attorney is not liable for the wrongful act of the officer, unless it be proved that he ordered it, or knew of its illegality beforehand.

Cur. adv. vult.

LORD DENMAN C.J. in the same term (Jan. 31st) delivered the judgment of the Court.—This case turns upon the question, whether the defendant *Champion*, being the bailiff for executing process within an inferior jurisdiction, was directed by the other two defendants, being the attornies who sued out the process, to make a levy in the plaintiff's house, which was proved to be out of the jurisdiction. The rule was granted on a doubt whether there was any evidence of such specific direction. The two defendants pleaded not guilty,

(a) See *Codrington v. Lloyd*, 3 N. & P. 442.

(b) R. Hil. 2 & 3 Geo. 4.

(c) 1 C. M. & R. 223.

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and, secondly, a justification under the judgment and *fi. fa.*, averring the plaintiff's house to be within the jurisdiction. The plaintiff contented himself at first with proving the goods seized, and that they were taken by the defendant *Champion* under a precept handed to him by the defendants *Tresidder* and *White*. At the close of this case the counsel for *Tresidder* and *White* applied to the learned judge to direct their acquittal, which we think he properly refused. The ground for the application was the alleged absence of any evidence against them to make them co-trespassers; but this ground, if true in fact, would by itself have been wholly insufficient to warrant it. The application to a judge, *in the course of a cause*, to direct a verdict for one or more of several defendants in trespass, is strictly to his discretion; and that discretion is to be regulated not merely by the fact that at the close of the plaintiff's case no evidence appears to affect them, but by the probabilities whether any such will arise before the whole evidence in the cause closes. There is so palpable a failure of justice when the evidence for the defence discloses a case against a defendant already prematurely acquitted, that such acquittal ought never to take place but where there is the strongest reason to believe that such a consequence cannot follow. In the present case we think that if in truth there had been nothing for the jury to consider as against these two defendants, the judge would have exercised a sound discretion in refusing to direct their acquittal when the application was made; but we are of opinion, that until the judgment was put in, and they appeared to be acting as attornies in the execution of a judgment, they could be considered only as directing a seizure of the plaintiff's goods without any authority; and although the direction was in terms to seize within one jurisdiction, and the seizure was in fact made in another, yet it was open for the jury, as against wrong-doers, to consider upon the evidence whether they did not direct the seizure to be made in that place, in which they certainly knew that it would take

(a) See also *Hitchen v. Teale and others*, 2 Moo. & R. 30.

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place. The defendants then attempted to establish their justification, but failed: they proved, however, a judgment against the plaintiff, and an execution regular in all respects, except that the plaintiff's house was not within the jurisdiction. In the course of this evidence, however, it clearly appeared that the two attornies had merely handed the precept to the bailiff to be executed; and it was now contended that they were not liable to an action of trespass if he acted beyond the bounds of his franchise, which it was his duty to know, and not their's. The plaintiff, not disputing this general proposition, contended that the attornies had in effect taken upon themselves to order the bailiff to enter the plaintiff's house. The circumstances relied upon to prove this proposition were, that all these persons living near together and being acquainted, and the plaintiff having notoriously no other house than this, and no goods but what were in this, the bailiff must have understood the attornies, when he received the precept from them, to intend that he should make the seizure in that identical house; and further, that one of the attornies sent a message to the plaintiff to inform him that *Champion* was about to be absent a short time, and would not levy on that day. The special pleas, pleaded by all the defendants, were also strongly urged, as shewing that they all avowed and justified the fact of levying at the plaintiff's house; *Tresidder* and *White* thus adopting the act of *Champion*, as indeed they might fearlessly do, if they believed their own plea, that the house was within the jurisdiction.

Upon consideration these grounds appear to us all insufficient. 1st, The attorney who places a writ for execution in the hands of an officer does a lawful act, though he may be fully persuaded that the officer will be likely to execute it in some particular place, which may turn out upon inquiry to be out of his jurisdiction. The attorney's opinion upon such a point is immaterial, unless he induces the officer to act upon it; he is not bound to form any; the officer must, at his peril, act where he has the power. We think that the circumstances of the case go no further than to shew that when the attor-

ney gave the precept, he thought it would be executed at the plaintiff's house, without directing or authorizing it. 2ndly, If it could be pressed even to the extent of implying that the attorney knew the bailiff intended to do so, we cannot say that is any evidence of his giving such authority. The bailiff may have told him his intention, and the attorney may have either thought him right or not thought about the matter. That the bailiff's intention originated with some act or word of the attorney, is not at all evidenced by the knowledge now supposed. If indeed the bailiff had communicated his intention with respect to a house that the attorney knew to be out of the jurisdiction, his acquiescence in an act, which he must have known to be illegal, might possibly have made him a joint trespasser. But every thing here makes it impossible to doubt the attorney's bonâ fide belief that the house was within the jurisdiction. 3rdly, Furthermore, the plaintiff argues the co-operation of all the defendants in the unlawful entry of the plaintiff's house from the special pleas. He contends that if the attorney gave no special direction to the bailiff, he would have rested on the general issue, and not have defended himself by asserting the lawfulness of the act as done within the jurisdiction. The introduction of a special plea on the record, however, can furnish no evidence in answer to the general issue. A defendant, by adducing evidence on a second plea, may strengthen against himself a case already made on the first, but he makes no such case by the mere averments or admissions in such plea(a). Upon the whole therefore we think that at the close of the case, as the two defendants, *Tresidder* and *White*, would have been entitled, if sued without *Champion*, to a nonsuit, they were entitled to a positive direction from the judge to the jury that they ought to find a verdict in their favour, and that he was mistaken in leaving it at all as an open question for their consideration. It follows that as these defendants

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(a) See *Edmunds v. Groves*, 2 Mee. & W. 642; *Bennion v. Davison*, 3 Mee. & W. 179.

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are to have the same benefit now as if the judge had given that strong direction, and a verdict had passed in their favour, a verdict of not guilty ought now to be entered for them.

Rule absolute.

PEARSON, Assignee of JAMES GRAHAM, v. ANDREW
GRAHAM (a).


A trader committed an act of bankruptcy by absconding from his house. He left behind him a shopman, who, being ignorant of the act of bankruptcy, sold certain goods and received the payment for them. More than two months after such sale a fiat issued against the trader. The assignee brought an action of trover against the shopman, who pleaded not guilty, and that the plaintiff was never possessed as of his own property. —Held, first, that the defendant was guilty of conversion, and could not avail himself of any defence in respect of his character of

TROVER for hops possessed by the plaintiff, as assignee. Conversion by the defendant after the bankruptcy. Pleas: 1st, not guilty; 2d, that *James Graham* was not a bankrupt; 3d, that the plaintiff was not lawfully possessed of the said goods *modo et formâ*. On the trial before *Tindal* C.J. at the Summer assizes for Westmoreland in 1835, it appeared in evidence that *James Graham* had been a seed dealer at Natland, in Kendal, and the defendant was his brother and assistant in business. In July, 1834, the bankrupt left his house with the intent of avoiding his creditors, but concealed that object from the defendant, who was left to carry on the business. A short time after his departure the defendant sold a quantity of hops belonging to his brother to a person named *Penn*, and received the money for them, which he applied in payment of some of his brother's creditors. Upwards of two months after this sale a fiat of bankruptcy was issued against *James Graham*, and the act of bankruptcy relied on was the above absconding of himself. On these facts the jury found that *James Graham* did commit an act of bankruptcy before the sale of the goods, but that the defendant acted under his general authority, and had not at the time of the sale notice of this act of bankruptcy. The learned judge directed the verdict

(a) This case was decided in Trinity term last (May 31st). See *ante*, 557, note (a).

general agent, even if it were available, unless it were specially pleaded. Secondly, that to defeat the title of the assignee by the 6 *Geo.* 4, c. 16, s. 81, or s. 82, it should have been shewn that the purchaser had no notice of the act of bankruptcy at the time of the purchase; and as no evidence was offered at the trial to prove the want of notice in such purchaser, the second plea was not proved.

to be entered for the plaintiff, but gave the defendant leave to move to enter a nonsuit. In the ensuing Michaelmas term *Blackburne* obtained a rule nisi, against which cause was now shewn by


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Cresswell and *Wightman*. The plaintiff is clearly entitled to retain his verdict upon the first and second issues. It must be admitted that by the sale of the goods the defendant was guilty of a conversion. He had no authority to sell the goods in question, either express or implied. [*Patteson* J. There is a case where a trader in prison employed an auctioneer to sell goods, and the auctioneer sent the proceeds by another person; and it was held that the assignees could not sue the latter.] That was *Coles v. Wright* (a); and *Coles v. Robins* (b) was an action brought against the auctioneer, but it was considered that the sale was in truth the act of the bankrupt. The third issue is, whether the goods were the property of the assignee. How can that be disputed? His title accrued on the act of bankruptcy, and his appointment relates to that act. The property in the meantime belongs to him. But it is said, that as the goods were *bonâ fide* sold by the defendant more than two months before the issuing of the fiat, he is protected by the 6 *Geo.* 4, c. 16, s. 81. In the first place, however, that section applies to two persons only, the bankrupt, and the person dealing with the bankrupt, but does not protect any third party who, standing in the situation of the defendant, chooses to intermeddle with the property of the bankrupt. Neither will section 82, which renders valid payments made to any bankrupt after the act of bankruptcy, and which protects purchasers, *Cash v. Young* (c), be of any avail for the defendant. Secondly, assuming that there might be a defence arising out of these sections, it ought to have been specially pleaded, and is not open to the defendant upon the pleadings in this cause. The defendant

(a) 4 Taunt. 198.

(b) 3 Camp. 183.

(c) 2 B. & C. 413; S. C. 3 D. & R.
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has simply pleaded that the plaintiff was not possessed as of his own property, he cannot shew that that property which had once vested, had since been divested. He ought to have pleaded specially that he sold the goods *bonâ fide*, without notice of the act of bankruptcy.

Alexander in support of the rule. The defendant here was not guilty of any conversion, and is therefore entitled to a verdict on the first issue. An agent of the bankrupt would not have been guilty of a conversion under the circumstances of this case; *Coles v. Robins* (a), *Coles v. Wright* (b), and *Tope v. Hockin* (c). The defendant had a general authority to act for the bankrupt, and there can be no distinction between his case and that of a person acting under an express authority. But the plaintiff has failed upon the third issue. He was not possessed of the goods as his own property. The 6 Geo. 4, c. 16, s. 81, protects all dealings and contracts entered into with respect to a bankrupt's goods, which are made more than two months before the issuing of the fiat, notwithstanding a prior act of bankruptcy, provided the party had no notice of it. Here the sale took place more than two months before the fiat issued, consequently the hops became the property of the purchaser, and could not have belonged to the plaintiff, who only took by the assignment that which belonged to the bankrupt. The plea, therefore, is quite sufficient. Besides, the payment here being to the bankrupt's agent, is the same as though it had been made to himself; and according to section 82, all payments made to a bankrupt before the issuing of a fiat are protected, notwithstanding there was a previous act of bankruptcy, if it were unknown to the party who makes the payment. In the present instance, therefore, the payment was protected. According to *Cash v. Young* (d), which was decided on the 1 Jac. 1, c. 15, s. 14, and *Hill v. Farnell* (e), on the 6 Geo. 4, c. 16,

(a) 3 Camp. 183.

(d) 2 B. & C. 413; 3 C. 3 D.

(b) 1 Taunt. 198.

& R. 652.


(c) 7 B. & C. 101; S. C. 9 D.

(e) 9 B. & C. 45.

& R. 881.

s. 82, an action of trover could not have been maintained against the purchaser for those goods, it cannot, therefore, be maintainable here.

Cur. adv. vult.

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Lord DENMAN C. J. now delivered the judgment of the Court.—This was an action of trover by the assignee of a bankrupt, *George Graham*, brother of the defendant. There were three pleas: 1, not guilty; 2, denying the bankruptcy; 3, that the plaintiff was not possessed in manner and form as in the declaration alleged. The jury found for the plaintiff. The act of bankruptcy was committed on the 24th of July 1834, by the bankrupt leaving his place of abode, to which he did not return. The defendant on the next day, acting as servant of the bankrupt, sold the goods in question to a person who paid 74*l.* for them, being their fair value, and took them away. The jury found that the defendant acted under a general authority, and that he did not know of the act of bankruptcy: but no question appears to have been submitted to them as to the knowledge of the purchaser. The commission issued in the month of November, 1834. Upon this state of facts two questions arise: first, whether the defendant did convert the goods at all? and, secondly, if he did, whether the plaintiff, as assignee, was possessed of them; or, in other words, whether any property in them passed to him by the assignment of the commissioners?

As to the first question, it might be very doubtful whether a servant delivering goods by his master's order could be said to have converted those goods as against the assignees of his master. *Coles v. Wright* (a) rather seems to shew that he could not. But in the present case the defendant had received no express orders as to the goods in question, but took upon himself, under a general authority, to sell and deliver them at a time when, as it afterwards turned out, his master had absconded and abandoned all control over his property. This was a sufficient dealing

(a) 4 Taunt. 198,

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with them to constitute a conversion, unless by any other facts the defendant could shew that he was justified in what he did; and then such justification should have been put on the record by way of special plea.

The next question therefore arises, viz. whether the property in these goods passed to the plaintiff as assignee under the assignment of the commissioners. Now, assuming that it would pass by relation to the act of bankruptcy, that is, from the 24th July, still it is contended that the sale is protected and rendered valid by the 81st section of the 6 Geo. 4, c. 16, and that the plaintiff had, in consequence of that section, no property and no possession, actual or constructive. That section renders valid all conveyances by, and all contracts and other dealings and transactions, by and with any bankrupt, *bonâ fide* made and entered into more than two calendar months before the date and issuing of the commission against him, notwithstanding any prior act of bankruptcy, provided the person so dealing with such bankrupt had not at the time of such conveyance, contract, dealing, or transaction, notice of any prior act of bankruptcy. In this case the transaction was more than two months before the commission, and the defendant had no notice of a prior act of bankruptcy. But the defendant was not the person dealing with the bankrupt, he was the agent or servant of the bankrupt, and the person dealing with the bankrupt was the purchaser. In order, therefore, to render the transaction valid, the jury should have been satisfied that the purchaser had no notice of a prior act of bankruptcy; as to which no question was put, nor, as it should seem, any evidence offered. The onus of shewing the validity of the sale, in order to raise the question of property or no property in the plaintiff, (assuming that it could be so raised,) lay with the defendant; and as he failed in shewing the validity, the general rule applies, and the property was in the plaintiff by relation.

A further question arises on the 82d section, which provides that all payments really and *bonâ fide* made to a bank-

rupt before the date and issuing of a commission, shall be deemed valid, notwithstanding a prior act of bankruptcy, provided the person so dealing with the bankrupt had not, at the time of such payment to him, notice of any prior act of bankruptcy. *Cash v. Young (a)*, and *Hill v. Farnell (b)*, are authorities to shew that a payment on a ready-money purchase is within this section; but still, as before, the point for the jury is, whether the *person paying* had notice of an act of bankruptcy; and that point was not submitted to the jury. The former observations therefore apply, and the rule for entering a nonsuit must be discharged.

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Rule discharged.

(a) 4 B. & C. 413; S. C. 3 D. & R. 652.

(b) 9 B. & C. 45.

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 CRAVEN v. SANDERSON and others.

Tuesday,
 January 23d.

PROHIBITION. The declaration stated, that whereas the parish of Wakefield, in the county and diocese of York, In a declaration in prohibition the plaintiff com-

plained of a rate for the repair of a parish church which had been laid on three only out of four townships of which the parish was composed, and he alleged that all four were liable to contribute. The defendant claimed exemption for the fourth township, and in his plea alleged that it had a separate chapel of its own, where the inhabitants had immemorially enjoyed all divine rites, and which they had immemorially repaired by rates laid exclusively upon the chapelry. The plea concluded with a traverse of the allegation of the liability of the four townships to contribute to the repairs of the parish church, and the plaintiff joined issue thereon. Held, that the plaintiff did not thereby admit all the facts stated in the inducement, but that the defendant was bound to prove them, or so much of them as was required to establish the exemption claimed by him.

A township had had from time immemorial a separate chapel, where all ecclesiastical rites and services had been accustomed to be performed by the inhabitants of such township, and which they had been accustomed to repair by rates levied upon themselves, and they had never been rated to the repair of the parish church. A plea setting forth these facts concluded with an averment that the inhabitants were exempt from contributing to the repairs of the parish church; and upon the trial the jury found for the defendant. Held, that after this verdict it might be presumed that they had found that the chapel was *coeval with* and not built *in aid or ease of* the parish church, and if so, the chapelry might be exempt; the Court therefore refused to allow the plaintiff to enter a verdict for him *non obstante veredicto*.

Where a chapel has been built under the 58 Geo. 3, c. 45, and the 3 Geo. 4, c. 72, it must be repaired by the parish or place in which it is built, and those places only are to be called upon to pay the rates which were previously liable to be assessed to the repairs of the church or chapel of that place. Therefore where a township was previously exempt from the repairs of the parish church; it was held not to be liable to be rated for the repairs of a chapel built under those statutes within the parish, but not within the township.

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had immemorially been an ancient parish, with a parish church belonging to it, and hath been divided into certain townships, viz. Wakefield, Stanley-cum-Wrenthorpe, Alverthorpe-cum-Thornes, and Horbury, and the inhabitants of the said townships have been liable to contribute to the repairs of the parish church; and whereas since the 3 Geo. 4, c. 72, three chapels have been erected and built within the parish of Wakefield by virtue of the said act, and other acts of parliament then in force for building additional churches in populous parishes, viz. one chapel in Stanley, appropriated to an ecclesiastical district ascertained and marked out under the said acts of parliament; another chapel in Alverthorpe also appropriated, and another in Thornes not appropriated, and that by the said acts and by the law of the land the repairs of the said district chapels, of Stanley and Alverthorpe, ought to be made by the said parish at large, or by the districts to which they belonged, by rates to be raised within the districts respectively, and the repairs of the said chapel in Thornes by the parish at large; and whereas in the vestry of the said parish church on the 11th August, 1831, the churchwardens and the inhabitants of the said parish, or the major part of them, made a rate upon the parishioners, inhabitants of the said parish, for certain repairs of the said parish church, by which rate the parishioners, inhabitants of the township of Horbury, were not rated to the repairs of the said church, and the parishioners, inhabitants of the said townships of Wakefield, Stanley-cum-Wrenthorpe, and Alverthorpe-cum-Thornes only, by the said rate were rated to the said repairs, excluding Horbury, and the parishioners, inhabitants thereof, from contribution to the rate for the said repairs; and the said plaintiff, before and at the time of the making of the said rate, and thence hitherto, hath been and still is a parishioner inhabitant in the township of Wakefield aforesaid; yet the said defendants, churchwardens of the said parish, well knowing &c., but pretending that the parishioners, inhabitants of the said township of Horbury, are

not liable to contribute or be rated to the repairs of the said parish church, by reason of some supposed custom, prescription, or law of the land; and that the repairs of a certain chapel in Horbury aforesaid, have been immemorially made by the parishioners, inhabitants of the said township of Horbury only, and that the said rate in respect of the said premises was and is a valid rate, and intending to aggrieve, &c.

The declaration then set out the libel of the defendants in the Spiritual Court, which alleged that the parish church of Wakefield wanted repairs &c., the costs of which ought to be paid by a rate on the possessors and occupiers of houses, lands, &c. in the townships of Wakefield, Stanley-cum-Wrenthorpe, and Alverthorpe-cum-Thornes; that the said *Michael Sanderson*, &c. (the defendants in this action) after the requisite proceedings (which were set out) made with the inhabitants a rate for the repair &c. for the said church, and that *Craven* (the plaintiff in this action) was thereby duly rated at the sum &c. for premises which he occupied in the parish of Wakefield; that *Sanderson*, &c. were the churchwardens of the said parish duly elected, sworn, and admitted, and that the rate was then due. The plea to the libel was also set out, wherein the respondent alleged that the exemption of Horbury, if any, from liability to repair the parish church, ought to have been pleaded, and he denied that he was legally rated, or that the rate was due to the churchwardens as libelled. The declaration then set out the answer of the churchwardens, in which they insisted on the exemption of Horbury and the liability of the other townships, and alleged that Horbury had a chapel with all parochial rates, which chapel had from time immemorial been repaired by the inhabitants of that township. The answer of *Craven* was added, in which he again denied that the three townships were liable in exclusion of Horbury, or that Horbury had exclusively repaired the last-mentioned chapel. To the declaration in prohibition the defendant pleaded that the chapels in Stanley-cum-Wren-

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thorpe and Alverthorpe-cum-Thornes were built in aid of the parish church, and that there now is and from time immemorial hath been a church or chapel within the township of Horbury aforesaid, at which the inhabitants of that township do receive and enjoy, and from time immemorial have received and enjoyed all manner of divine rites and services, and that the costs and expenses of repairing the said church or chapel, and of providing necessities for the performance of divine rites and services therein, are and from time immemorial have been exclusively paid and defrayed by rates and assessments upon the possessors and occupiers of lands, houses, and tenements situate within the said township of Horbury; and that from time whereof &c. no rate or assessment for or towards payment or defraying the expenses of repairing the parish church of Wakefield aforesaid, has been made, laid, or assessed upon any person for or in respect of any houses, lands, and tenements situate within the township of Horbury aforesaid, without this that the inhabitants of the said township of Wakefield, Stanley-cum-Wrenthorpe, and Alverthorpe-cum-Thornes, and Horbury, in the said declaration mentioned, from time whereof &c., have been or are liable to contribute to the repairs of the said parish church of the parish of Wakefield aforesaid, in manner and form &c.; conclusion to the country. Similiter.

On the trial before Lord *Lyndhurst* C. B. at the York summer assizes, 1834, it was proved by the parish clerk of Wakefield, who was called as a witness for the plaintiff, that the chapelry of Horbury was within the parish of Wakefield, and that the inhabitants paid their tithes and mortuaries to the vicar of that parish. Upon cross-examination he stated that for twenty-five years no church rates in respect of the parish church had ever been collected from the inhabitants of Horbury; that they did not attend the parish vestry, and that chapelwardens for Horbury were sworn in at the visitation separate from those for Wakefield. Upon this evidence being given, the Lord

Chief Baron was of opinion that the defendants were entitled to a verdict, as he held that all the facts stated in the inducement to the traverse were admitted upon this issue, and such facts, coupled with the present evidence, established the exemption of Horbury. Accordingly the verdict was taken for the defendants.

In the ensuing term *Alexander* obtained a rule nisi for a new trial, or for judgment *non obstante veredicto*, on the ground subsequently argued, as to the construction of the statutes 58 Geo. 3, c. 45, and 3 Geo. 4, c. 72; against which cause was shewn in Hilary term, 1836, by

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Sir F. Pollock, Sir W. W. Follett, and Addison. The direction at the trial was correct. The declaration alleged that the different townships, including Horbury, have immemorially been liable to contribute to the repairs of the parish church; that allegation is expressly traversed in the plea. The plea therefore contains a mixed allegation of law and fact, upon which an issue is tendered, and has been taken by the plaintiff. Now although there cannot be a traverse of a mere allegation or inference of law, yet there is no objection to an issue on a matter of fact combined with matter of law; *Dawes v. Papworth (a)*. Assuming, however, that the traverse was immaterial, the plaintiff might have traversed some one of the facts stated in the inducement, by the new rule Hil. 4 Will. 4, No. 13, or he might have objected by special demurrer to the traverse. *Com. Dig.* Pleader (G 22); 1 Wms. Saund. 14, note (2). The objection, therefore, is now too late. The facts admitted in the inducement, together with those proved on the trial, support the plea.

The argument on the other point is given in a subsequent part of the report.

Alexander and *Hoggins* in support of the rule. It was

(a) Willes, 408.

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incumbent upon the defendants to prove all the facts stated in the inducement; for the plaintiff, by joining issue upon the traverse denied the whole. It contained a mixed allegation of law and facts, from which the defendants infer the exemption of the chapel of Horbury. As that inference is drawn from all the facts, the replication denying the inference also puts in issue those facts, upon the principle established by *Selby v. Bardons* (a). The traverse was not immaterial, and therefore could not have been passed over and the inducement pleaded to, according to the new rule. The direction was therefore wrong, and the defendants failed in substantiating their plea, because they did not prove that the inhabitants of Horbury had the benefit of all divine rites at their own chapel, and also repaired their own chapel by rates laid on their own chapelry.

Cur. adv. vult.

Lord DENMAN C. J. on a subsequent day in that term delivered the judgment of the Court.—The plaintiff in prohibition complained of a church rate laid on three only out of four townships which compose the parish of Wakefield. The defendants claimed exemption for the fourth township (Horbury) in a plea alleging that it had a separate chapel of its own, and a custom to perform there all ecclesiastical rites, and to repair it by rates levied exclusively on its own inhabitants, and traversing the liability of all four to repair the parish church. Issue was joined on the traverse. On the trial at York before Lord *Lyndhurst*, the plaintiff contented himself with proving that the township of Horbury was locally situate in the parish of Wakefield; the defendants then argued, from evidence adduced by the plaintiff, that Horbury parish had a separate chapel where the rites were administered; and the learned judge interposed with an observation to the plaintiff's counsel, that the evidence appeared very strong to that

(a) 3 B. & Ad. 2; S. C. in error, as *Bardons v. Selby*, 1 C. & M. 500; 9 Bing. 756.

effect. The plaintiff's counsel required proof of separate rates being laid, but the judge then said, that issue was joined on the liability traversed, and that all the inducement to that traverse was admitted by the plaintiff's taking issue on it. The jury thereupon found a verdict for the defendants, which we are now required to set aside, and grant a new trial or give judgment for the plaintiff *non obstante veredicto*; but we think it would be inexpedient to decide on this motion the questions of law that may be raised on the validity of the plea, because the course taken at the trial in regard to the evidence appears to us to have been incorrect. For the traverse of liability, if wrong as too general, cannot be called immaterial, since it was the very point on which the cause turned; and we do not see how the plaintiff, denying the traversed fact, can be supposed to have admitted all the particulars in the inducement, which are put forward as making up the general fact. If, on the other hand, the traverse was immaterial within the meaning of the 13th rule of Hilary term, 4 *Will.* 4, so as to authorize the plaintiff to pass over it and select a single fact for denial, he ought to have taken that course. As the pleadings stand both parties are content to meet on the question of liability, and the defendants, on whom the burden of proving the exemption of Horbury falls, because it is against common right, were bound to make out all that was necessary to that end. The least they could do to entitle themselves to a verdict was to prove all the facts stated in the inducement. Now it is clear on consideration, though it struck my mind otherwise during the argument, that the mere facts of the chapel being kept in repair without coming upon the general rates of the parish, is no proof of the custom to repair it by means of a rate levied on the township, because it may have been preserved and repaired by voluntary contributions of the parishioners and others. It follows that the defendants, who have obtained a verdict in favour of the exemption from church rates without proving that part of their plea which avers the

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liability to chapel rates, cannot be allowed to keep that verdict, and the plaintiff is entitled to a new trial (a).

Rule absolute for a new trial.

After this rule was made absolute the pleadings were amended, and the defendants pleaded that the chapels in Stanley-cum-Wrenthorpe and Alverthorpe-cum-Thornes were built in aid of the parish church, and that there now is and from time immemorial hath been a church or chapel within the township of Horbury aforesaid, at which the inhabitants of that township do receive and enjoy, and from time immemorial have received and enjoyed all manner of divine rites and services, and that the costs and expenses of repairing the said church or chapel, and of providing necessities for the performance of divine rites and services therein, are, and from time immemorial have been paid and defrayed by rates and assessments upon the possessors and occupiers of lands, houses, and tenements situate within the said township of Horbury, and not elsewhere; and that from time whereof &c. no rate or assessment for or towards payment or defraying the expenses of repairing the parish church of Wakefield aforesaid has been made, laid, or assessed upon any person for or in respect of any houses, lands, or tenements situate within the township of Horbury aforesaid, and that the inhabitants of the township of Horbury have immemorially been exempt and discharged from all liability to contribute to the repairs of the parish church of Wakefield. Verification. The plaintiff in his replication, after admitting that Horbury had never paid any rates for the repair of the parish church of Wakefield, traversed all the other allegations in the plea.

On the second trial before Lord *Denman* C. J. at the York Spring assizes, 1836, the defendants again recovered a verdict, and in the following term a rule nisi was ob-

(a) On the subject of the traverse *Pearson v. Rogers and another*, decided in Q. B. Mich. T. 1838.

tained for entering a verdict for the plaintiff *non obstante veredicto*, which was argued as a special case in last term by

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Alexander, for the plaintiff. First, the defendants have not established that the chapelry of Horbury, before the statute of 3 Geo. 4, c. 72, s. 20, was legally exempt from contributing to the repairs of the mother church. It is true that the chapelry has never been rated to the repairs of the parish church of Wakefield; and that the jury have found the issue on the plea for the defendants, whereby it must be taken to be established that there has been immemorially a chapel at Horbury; that all the inhabitants of that parish have immemorially enjoyed divine rites therein, have repaired their own chapel by rates levied upon themselves only, and have, in point of fact, been exempt from the payment of rates levied for the repairs of the mother church. But it was incumbent upon the defendants to shew that there was a legal ground of exemption, and this they have not done. The general rule is, that all the inhabitants of the parish must contribute towards the repairs of the mother church; to that rule the only exception appears to be where there is an obligation thrown upon an individual or a district to repair some particular part of the church. For the fact that the inhabitants of the chapelry enjoy the divine rites at their own chapel, is not a ground of exemption (a); nor that they repair their own chapel (b). [*Coleridge J.* In those authorities it is assumed that there is a right of burial at the mother church.] That is so, but whether that right exists or not makes no difference. Thirdly, the inhabitants of the chapelry cannot claim to be exempt, because they have never been called upon to contribute to the repairs of the mother church. If none of these by itself is a legal ground of exemption, neither will they,

(a) *Gibbs. Cod.* 197; p. 221, in the first ed., cited in 1st *Burn's Ecc. L.* 303.

(b) 2 *Roll's Abr.* 289, cited in

Burn's Ecc. L. 353; *Dogge's Pars. Couns.* 169; *Com. Dig. Esglise*, (G 2).

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when combined (and the present is a case where there is such a combination), operate to discharge the inhabitants of the chapelry from their *primâ facie* liability at common law. No consideration is shewn by way of benefit to the rest of the parish, which can sustain the claim to exemption. But, secondly, assuming that the inhabitants of the chapelry were formerly exempt, as is contended, they are liable under the New Church Building Acts to contribute to the repairs of the district chapel, and therefore the rate which is now raised in part for the repairs of the district chapel, and omits the inhabitants of this chapelry, is bad. This point depends upon the construction of the 3 *Geo.* 4, c. 72, s. 20. The 58 *Geo.* 3, c. 45, which was passed for promoting the building of new churches, provides in s. 70 "that the repairs of district churches or chapels shall be made by the district to which they belong; and where no district shall have been assigned, they shall be made by the parish at large." That statute was amended by the 59 *Geo.* 3, c. 134, but was not altered in this respect. The 3 *Geo.* 4, c. 72, s. 20, however enacts, "that chapels built in aid of the churches of the parishes or places whether districts have been assigned or not, shall be repaired *by the parishes or places at large* to which such chapels shall belong, and rates shall be raised for that purpose in like manner as for the repairs of the churches of such parishes or places." The statute therefore throws upon the parish at large the repairs of the new chapels built in aid of the parish church, and therefore, however the case may be in regard to the repair of that church, the inhabitants of the chapelry must contribute to the repairs of the new chapels.

Cresswell, contra. The answer to the last point is, that it is only where the chapels are built in aid of the churches in any parishes and other places, that the charge of repairing such chapels is imposed upon the parishes and places at large. Now if Horbury be wholly distinct and separate from the rest of the parish of Wakefield, the chapels in question can-

not have been built in aid of the church of Wakefield, but in aid of the parish of Wakefield, exclusive of the chapelry of Horbury. The charge therefore would not extend to the chapelry. Again, the rates for these repairs are to be raised in like manner as for the repairs of the churches of such parishes and places. Now, if the inhabitants of this chapelry were not bound to contribute to the repair of the parish church, no rate can be imposed upon them for the repair of the new chapels. So that the whole case depends upon the question, whether the chapelry of Horbury be legally exempt from contributing to the repairs of the parish church. None of the authorities referred to will decide it; but the jury have found that in fact the chapelry is exempt; and if by possibility such exemption can exist in law, the defendants are in this stage of the proceedings entitled to judgment. Now in *Ball v. Cross* (a) a distinction is pointed out between chapels built in ease of the parish church and those which are coeval with it. In regard to the former, no exemption can be established; but in the latter, if there be no participation in the divine rites at the parish church, it may be. This proposition is supported by *Brown v. Palfry* (b), *Aston v. Castle Birmidge Chapel* (c), 2 *Roll. Abr.* 290. Hence, although an exemption from the general repairs of the church may be established upon proof of an exclusive liability to repair some particular part of it, yet a prescriptive exemption may be established, though no custom exist to repair any part of the mother church, because it may be presumed that the church and the chapel are coeval. In this case therefore the jury and the Court might fairly presume that the chapel was erected at the same time as the church, and not simply in aid of it. If that were the fact, the exemption now found by the jury is valid.

Alexander replied.

Cur. adv. vult.

(a) 1 Salk. 164; S. C. Holt,
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(b) 2 Lev. 102.
(c) Hob. 66.

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Lord DENMAN C.J. now delivered the judgment of the Court.--This was a suit in prohibition to restrain the parish officers of Wakefield from enforcing a rate for the repair of the parish church and of three chapels belonging to three townships within the parish, two of which chapels were appropriated to districts, under the Church Building Acts, and one was not so appropriated. The rate was imposed on all the occupiers within the parish except those within a fourth township, called Horbury. The question was, whether they were properly omitted from the rate. The jury found a verdict in the defendants' favour, at the summer assizes in 1834, and again in substance the same verdict, on a new trial in the spring of 1836, though the plea had undergone some amendment. We are to determine whether the amended plea states a legal exemption for that township from the common law liability to be taxed for the reparation of the parish church. The replication, on which the parties went to the country, after stating that the chapels of the three other townships were not built in aid of the parish church, on which however no dispute was raised, further alleged in denial of the plea, that there is not, from time whereof the memory &c., a church or chapel within Horbury, 'at which the inhabitants of that township receive and have immemorially received all manner of divine rites and services, and that the costs and expenses of repairing the said church or chapel, and of providing necessaries for the performance of the same, have not, from time immemorial, been defrayed by rates and assessments on property in Horbury, and that the inhabitants of Horbury are not exempted from the repairing of the parish church, but ought to be rated and assessed thereto. Then does the affirmative of these facts establish the exemption contended for? The plaintiff's argument was, that all may be true, and the township of Horbury may, notwithstanding, have had a church or chapel originally built in aid, or (as it is sometimes expressed) *in ease* of the parish church.


It was said, even before time of memory, the parish might be first created and the church erected, and afterwards the chapel built; that all parochial rites may have been performed there, the inhabitants of the township taking upon themselves exclusively the burden of repairing it; in which state of things the defendants did not dispute that the liability to contribute to the repairing of the church would not be taken away. The plaintiff referred to *Gibson's Codex*, 197 (edit. 1761), p. 21 (edit. 1713). No reference was made to the constitution of Othobon, which is copied in the same vol. (p. 235, edit. 1713,) "*De oblationibus capellarum restituendis ecclesiæ matri*," which enjoins restitution of offerings from chapels to parish churches by chaplains called "*ministrantes in capellis hujusmodi quæ salvo jure matricis ecclesiæ sunt concessæ*;" which passage shews that chapels have existed without the reservation of any privilege to the mother church, or rather that a parish church and a chapelry may exist within the same parochial boundaries, without the relation of mother and offspring, but independent of each other, and most probably coeval. In the other place above mentioned, *Gibson's* text is no doubt strong in its import; but it is needless to observe that that writer is not to be considered as an authority. The passage is made up of extracts from cases decided in our Courts, from which it will be found extremely difficult to deduce any rule of law whatever. In some it is said that a ground of exemption must be stated in pleading; in others, that the exemption should be directly averred, and that if it is qualified with "*ratione inde*," it will be bad. In some cases it is holden that to leave out of a church-rate certain parishioners or districts is no ground for prohibition; in others, the writ has been granted for that reason without any hesitation. In the case of *Aston v. Castle Birmidge* (a), the Court held that the inhabitants of a chapelry, sued for a rate raised for repairing a parish

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(a) Hob. 66; 2 Roll. Abr. 389.

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church, did not entitle themselves to a prohibition, by shewing that they had in fact repaired their chapel, and had performed there the rites of baptism and marriage, if they buried at the parish church. On all hands it was agreed that the mere fact of repairing their own place of worship gave no exemption. These authorities could hardly have supplied any safe rule for the decision of the present case; but at a later period Lord *Holt* had to deal with a case, the circumstances of which were almost identical with *Aston v. Castle Birmidge* (a); and though there was no necessity for laying down the principle on which legal exemptions must depend, yet he has explained it in a clear and satisfactory manner. In *Ball v. Cross* (b) he said "that by common law the parishioners of every parish are bound to repair the church. In the principal case those of a chapelry may prescribe to be exempt from repairing the mother church, as where it buries and christens within itself, and has never contributed to the mother church; for in that case it shall be intended coeval, and not a later erection." But he observed that "the chapel could be only an erection in ease and favour of them of the chapelry; for they of the chapelry buried at the mother church till *Henry* the Eighth's time, and then undertook to contribute to the repairs of the mother church." We have then the opinion of this learned judge, at a time when the doctrine of prohibition was far from obsolete, that where the chapelry has from beyond time of memory performed all its own parochial rites and services, it shall be intended *coeval, and exempt* from contribution. And such is the effect of the second plea. It might perhaps be argued that the fact of its being coeval ought to have been pleaded, and the opinion of the jury taken upon the proof; but in truth it seems much more reasonable to say that the law will presume its independence and coeval antiquity from facts susceptible of clear proof, which cannot be conceived to have existed if it

(a) Hob. 66; 2 Roll. Abr. 289. (b) 1 Salk. 164; Holt, 138.

were a mere chapel of ease. At any rate, if that fact is necessary to constitute exemption, it must be taken, after verdict, to have been proved to the satisfaction of the jury, who would unquestionably have drawn the inference from what they must have found in sustaining the defendant's plea.

Another point was made on the effect of the Church Building Acts, in connection with a local act for the parish of Wakefield, set out in the pleadings. That act, passed in the 55 *Geo. 3*, enacts that the parish church of Wakefield and a chapel of St. John, in Wakefield, are to be repaired by a rate, without saying on whom the rate is to be levied. The declaration also alleges that the three new chapels have been, under the 58 & 59 *Geo. 3*, built within the parish. Now the 58 *Geo. 3*, c. 45, s. 70, imposes the repair of district churches and chapels on the districts to which they may be assigned. The 59 *Geo. 3*, c. 134, s. 14, authorizes and empowers churchwardens of any parish, with consent of the vestry, to raise money for the repair of any churches or chapels (i. e. any within the parish) on the credit of the rates; and the 3 *Geo. 4*, c. 72, s. 20, reciting that "doubts may arise as to the repairs of churches or chapels built under the provisions of the two former acts or of this act," enacts "for remedy and prevention thereof (i. e. of the doubts) that all churches built by virtue of those acts or under any local acts, in cases in which no provision is made relating thereto in such local acts, in aid of the churches of the parishes or *places* in which they shall be situated, shall be repaired by the respective parishes or *places at large* to which such chapels shall belong, and rates shall be raised for that purpose in like manner in every respect as for the repair of the churches of such parishes and *places*; and all the laws then in force for making, raising, levying and collecting rates for the repair of churches, shall be applied and put in force for the making, raising levying, and collecting such rates, for the repair of such

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chapels, as fully and effectually, to all intents and purposes, as if the same were severally, separately and specially repeated and re-enacted in this act for that purpose as to the repair of such chapels." From these clauses in the three acts, taken together, a right is claimed to rate the parish at large (of course including Horbury) for the repairs of the district chapels, as neither by the Church Building Acts nor the local act is any express provision made relating to the levy of rates. And if this liability had been thrown on *parishes* at large, without *places*, the words could hardly have been satisfied by any other construction. But the addition of that word shews that other divisions besides *parishes* were considered capable of coming under the Church Building Acts; and the studious preservation of all laws then in force seems to keep the power of imposing rates precisely as it was then actually existing in each place. The *place* then for which rates may be imposed in respect of the new chapels in Wakefield is the whole parish, *minus* Horbury; for the law then in force excluded it from the parish for that purpose. We therefore think the plea good, as disclosing a substantial defence at common law, and open to no objection from the recent statutes.

Rule discharged.

DOE *d.* JAMES THOMPSON *v.* SUSANNAH THOMPSON (*a*).

Where a party was let into possession of lands in 1807 as tenant at will, and continued in possession till 1831 without making any acknowledgment of tenancy:—Held, that he had acquired no rights in the land so as to enable his heir at law, after the tenancy had terminated, to maintain ejectment under the 3 & 4 Will. 4, c. 27, even against a stranger.

EJECTMENT for land in Cambridgeshire. At the trial before *Parke* B., at the Cambridgeshire Summer assizes, 1835, the verdict passed for the defendant, with liberty to the lessor of the plaintiff to move to enter a verdict for him-

(*a*) This case was decided in Easter term last (May 4th).

self. This action was brought for the same lands as those in *Doe d. Burgess v. Thompson* (a), but was tried a year previously. The lessor of the plaintiff proved that his father, *James Thompson*, had been in possession of the land for upwards of twenty years before his death, in February, 1831; that his grandfather, *William*, died in September, 1833; that *James*, the father, died intestate, and that he was his heir at law, and relied upon the twenty years' possession of his father, under the 3 & 4 Will. 4, c. 27, ss. 2 & 7. The jury found that the father was in possession for upwards of twenty years before his death, as tenant at will to *William*, the grandfather of the lessor of the plaintiff. The learned baron directed a verdict for the defendant, giving leave to move to enter a verdict for the plaintiff. A rule having been obtained by *B. Andrews*, in Michaelmas term, 1835, pursuant to the leave reserved,

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Kelly now shewed cause against it. The question at the trial was, whether the possession by *James Thompson*, the father of the lessor of the plaintiff, was adverse to his father *William*. It was contended that if it was not adverse to *William Thompson*, still the lessor of the plaintiff was entitled to recover, as his father had occupied from the year 1808 to his death in 1831. But this action being brought within five years of the passing of the act (b), the 15th section reserves to the real owner five years from that period to bring any claim, and that has been held, in a subsequent ejectment brought for those lands, to be a bar to the twenty years' possession, under the 2d and 7th sections (c).

B. Andrews and *Gunning*, in support of the rate. The lessor of the plaintiff stands in the same position as if *James Thompson* had had twenty years adverse possession to the

(a) 1 N. & P. 215.

(b) The act passed July 24th,
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(c) *Doe d. Burgess v. Thompson*, 1 N. & P. 215.

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grandfather. Section 2 of 3 & 4 *Will.* 4, c. 27, enacts, that no person shall bring an action to recover land but within twenty years next after the time at which the right to bring such action accrued. Then section 7 enacts, that when any person is in possession of land, as tenant at will, the right of the person entitled subject thereto to bring an action, shall be deemed to have accrued at the expiration of one year next after the commencement of such tenancy. So that the right of the testator himself, *William Thompson*, to bring an ejectment for these lands, accrued at the end of the first year's tenancy, viz. in 1809. [*Coleridge J.* That would be so if the act had passed twenty years before the testator's death. You are applying these sections of the act as if it had been in existence in 1809, so as to have affected the rights of the parties at that time.] It is contended that the 2d and 7th sections would give to a party, who had been in possession for twenty years, an absolute right against all the world, if it were not for the 15th section, which reserves to the persons entitled to the land, five years after the passing of the act, to make claim, notwithstanding the twenty years shall have expired, but, except against them, twenty years' possession is a good claim against all the world. [*Patteson J.* It seems to me as if that section was addressed to parties who were and continued in possession after the passing of the act, and who would have absolute right if it were not for the 15th section; but when the tenancy at will was determined, as it was here, by the death of both lessor and lessee, it is difficult to say that the act applies at all.] The wife of the tenant at will remained in possession (a). [*Patteson J.* That is not a continuation of the tenancy at will.] The 2d and 7th sections destroy the doctrine of twenty years' adverse possession, and they prevent even the real owner from recovering after twenty years' possession; then section 15 enables the real owner for five years longer, but it is not applicable in this case, because the trustees

(a) See *Doe v. Thompson*, 1 N. & P. 215.

(who, it may be admitted, are the persons entitled under the will) are not parties to the suit. [*Coleridge J.* The defendant had a right to set up the title existing in the trustees, just like the ordinary case of a tenant setting up an outstanding term, which may be done without the permission of the termor.] It is contended that the 2d and 7th sections give an absolute title against all the world, except the real owner, and that certain parties only can set up the 15th section.

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The COURT (a).—The monstrous consequences which would follow the construction of the act, attempted to be put upon it by Mr. *Andrews*, shew that it cannot be the correct one, for it would make out that any person who had held for twenty years, without making any acknowledgment or paying rent, might come at any time within the period limited by the act, and turn any one out he found in possession. It would have been quite different if the lessor of the plaintiff had been the tenant at will, and had remained in possession for twenty years, for then the 2d and 7th sections would have given him a certain title, which would not have been defeated by the 15th section, if an action had been brought against him by any but the real owner. But here he must succeed on the strength of his own title. The tenancy here terminated by the death of his father, in 1831, two years before the passing of the act, and yet it is contended that, by virtue of the act, he has obtained an indefeasible estate, except against the real owner, by virtue of his father's possession for twenty years.

Rule discharged.

(a) Lord Denman C. J., *Littledale, Patteson and Coleridge Js.*



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DOE *d.* PETER BECK *v.* HEAKIN (*a.*).

1. Proof of holding a court-baron by the lord of the manor (father of the plaintiff) 35 years before action brought, and of deputations to gamekeepers by him, and also proof of holding of meetings professing to be Courts, and appointment of gamekeepers, by the plaintiff, in recent years, is *prima facie* evidence of a manor, without producing Court-rolls, or any documentary evidence.

2. A testator, after reciting that the estate at H. was charged with £ a year, gave it to his trustees in trust to keep down the interest on the said charge, and to apply the residue of the rents and profits until P. B. attained the age of 23,

and then to him absolutely, subject to the said charge:—Held, on ejectment brought by P. B., who was proved to have been in possession, that it was not incumbent on him, after putting in the will, to prove that the charge mentioned therein had not granted the legal estate elsewhere.

3. The defendant had encroached upon the lord's waste, and had occupied it with the lord's knowledge without interruption for ten years. A day or two before serving a declaration in ejectment, the lord entered and broke down the enclosure;—Held, that if there was sufficient evidence for the jury to presume a licence, this act was a sufficient countermand.

EJECTMENT for messuages and lands in Shropshire.

At the trial at the last Spring assizes at Shrewsbury before Bolland B., the following facts appeared. The lessor of the plaintiff claimed as devisee under the will of his deceased father. The land in question consisted of about four acres, which had been formerly part of the waste of the manor of Hope, and on which the defendant had built a cottage, about ten years before the commencement of the action. The will recited that the testator had *charged* his Hope estate with the sum of 3000*l.*, and then devised to his trustees "all that my manor of Hope," "to hold unto my said trustees, their heirs and assigns, upon trust that they do and shall keep down the interest of the sum of 3000*l.* charged thereon, and to apply the residue of such rents and profits in aid of my personal estate, until my son *Peter* attains the age of 23 years; and upon his attaining that age I give and devise the same manor and premises to him and his heirs absolutely, subject nevertheless to the said sum of 3000*l.* charged thereon." The lessor of the plaintiff was one of those trustees and executors appointed by the plaintiff, and he had attained the age of 23 years. To prove that Hope was a manor, the lessor of the plaintiff proved that his father had claimed to be lord, and that he had held a Court 35 years ago, and had granted deputations of gamekeepers. Beck, the father, died in 1824, and deputations of gamekeepers had been granted subsequently, signed by the trustees under the will. The lessor of the plaintiff had also held Courts, but which, the other side

(*a.*) This case was decided in Easter term last (April 19th).

contended, were mere unauthorized meetings. No Court-rolls or documentary proofs of the holding of Courts were put in. It also appeared that the lessor of the plaintiff had seen from time to time the encroachment made on the waste by the defendant, and had offered no interruption until within a day or two of the declaration in ejectment being served, when he and his servants had entered on the inclosure and broke down the fence. On these facts the counsel for the defendant contended that there was no proof of the existence of a manor at all. Secondly, on the authority of *Doe v. Wilson (a)*, that as the lord had permitted the encroachment to be made without interruption, a licence might be presumed. Thirdly, that at all events, as it appeared by the will that the estate had a charge upon it, it lay on the lessor of the plaintiff to shew that the legal estate was in him. The learned baron thought that a *prima facie* case of manor was made out, but gave leave to move the Court on all the points, and the verdict passed for the plaintiff.

Godson on a former day in Easter term (April 19th), moved accordingly. First, there was not sufficient proof to go to a jury of the manor. Secondly, the lessor of the plaintiff, having put in his father's will, thereby shewed that a charge existed on the estate, and therefore it lay upon him to shew that that charge did not involve the legal estate. [*Coleridge J.* It appears that the trustees had possession of the estate, they must therefore have taken under the will.] Thirdly, *Doe v. Wilson (a)* shews that ten or twelve years' passive conduct on the part of the lord is sufficient for the jury to infer a licence, and if so that licence should have been countermanded, and treating the tenant as a trespasser is not sufficient.

Cur. adv. vult.

LORD DENMAN C. J., on a subsequent day in the term (May 5), delivered the judgment of the Court. The lessor

(a) 11 East, 56.

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of the plaintiff had recovered a verdict at the trial, claiming the land in question as parcel of the waste of his manor. It was objected at first that he had given no evidence of a manor, or of his being the lord, because he had produced no Court-rolls, nor any other documentary proofs of the holding of Courts; but this last was certainly not necessary: and the parol evidence that his father had held a Court 35 years ago, and he himself on several occasions more recently, with proof of the appointments of gamekeepers by deputation, were clearly sufficient *prima facie* evidence of both facts.

It was next objected, the lessor of the plaintiff having put in his father's will, that he had thereby shewn the legal estate out himself. The will was stated to recite some subsisting charges, and then to devise to trustees to keep down the interest on them, and apply the surplus rents as therein directed, until the lessor of the plaintiff should attain the age of 23, and then it devised to him, subject to the before-mentioned charges. We think we cannot infer from this statement that any legal estate was outstanding in the incumbrancers, but that the more reasonable presumption is that which accords with the very words of the will.

Lastly, it was said, that as the cottage had been built on land inclosed from the waste, and there was evidence of this having been done with the knowledge of the lord, a licence at least must be presumed, and that it had not been properly revoked before action brought.

The lessor had proved, that a very short time, a few days only, before the action brought, he and his servants had entered on the inclosure and broken down the hedges in several places. It appears to us that this act, the purpose of which was unambiguous, was evidence from which the jury were warranted in finding a revocation of the licence. Such revocation might be by action *in pais* or by parol, and no precise time is limited by law as necessary to intervene between it and the commencement of the action which treats the party in possession as a trespasser. We think there should be no rule.

Rule refused.

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The QUEEN v. GUEST and others.

THIS was an appeal against a rate made for the relief of the poor of the parish of Merthyr Tydvil, in the county of Glamorgan. The appellants are the lessees and occupiers of certain iron works called "The Dowlais Iron Works," in the said parish of Merthyr Tydvil, and, as connected with these iron works, they are also lessees and occupiers of certain mines and coal mines. One portion of the coal mines, in the occupation of the appellants, is situated in the parish of Merthyr Tydvil, and the other portion is situated in the parish of Gellygare, in the county of Glamorgan, being the adjoining parish to that of Merthyr Tydvil, and the latter portion is brought from the parish of Gellygare by means of an underground adit, the mouth of which is situated in the parish of Merthyr Tydvil. The appellants objected to the rate on the coal brought from the mines in the parish of Gellygare, on the ground that it was chargeable in Gellygare, and not in Merthyr Tydvil. The sessions allowed the objection, and amended the rate accordingly, and no question was raised with respect to the amendment. The appellants further objected to the amount of the rate upon their iron works, because several engines and other machinery, used for working the iron mines, mentioned in the said rate, and also the several engines and other machinery used in the process of manufacturing iron from the iron stone, were, as the appellants alleged, not fixed to the freehold, so as to be regarded as real property rateable to the relief of the poor, and it was proved that personal property was not charged to the poor rate in the parish. The mode of erecting such engines and machinery was proved to be as follows: The soil is first excavated to a certain depth, for the purpose of laying down foundation walls of strong masonry; into these walls, when built, are introduced balk and other strong timber, which are covered and secured by means of bolts and other contrivances to and by an iron

Real property must be rated to the poor-rate according to its actual value, as combined with the machinery attached to it for manufacturing purposes, without considering whether that machinery be real or personal property, so as to be liable to distress or seizure, or whether it would descend to the heir or executor, or belong, on the expiration of a lease, to landlord or tenant.

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platform; upon this platform are placed frames made of wood and iron, which frames are inserted into the walls of the buildings in which the engine and machinery are inclosed; these frames then serve as the foundation of the engines and machinery, which are attached to the frames by means of cotterells or keys and jibs, in such a manner as to be tightened or slackened, or altogether removed at pleasure; such removal may be effected from and out of the buildings which inclose them, without injury either to the engines or machinery, or to the buildings or the soil, and without displacing any part thereof. The machinery thus described is referred to in the amount of value in the Schedule No. 2 of the rate thereunto annexed. The iron mines occupied by the appellants are situate in the parish of Merthyr Tydvil, and within a short distance from the works, engines and machinery comprised in the rate. As to such of the engines as are applicable to the working of the iron mines, whether such engines are fixed to the freehold or not, the sessions allowed the objection and amended the rate accordingly, and no question is raised as to such amendment. The sessions, with the amendments before mentioned, confirmed the rate, subject to the opinion of this Court. The schedule was set out, and the following are some of the items, which were very numerous and all similar :

Landlord.	Person Rated.	Property Assessed.	Schedule No. 1, Fixed Building.	Schedule No. 2, Machinery and Engines alleged to be Chattels.
Marquis of Bute and Messrs. Guest, Lewis & Co.	Messrs. Guest, Lewis & Co.	11 Blast Furnaces.	£. 10,500	£. 17,000
		5 Blast Engines.	4,500	
		FINERY, Roof and Building,	120	
		9 Fires, Puddling Forge.	630
		38 Furnaces, Roofs & Buildings, Engine for Rolling, &c. &c.	1,543	2660 60

The question for the Court was, whether the appellants were liable to be rated for the various properties referred to in the schedule No. 2 of the rate before set forth, or whether the rate was unequal in respect of the appellants being rated for them. If the Court shall be of opinion that the several properties comprised in the second schedule, before set forth, ought not to be charged, the rate to be amended and altered accordingly.

Another case had previously been sent up by the sessions, in which a great variety of questions were submitted to the Court; that, however, was subsequently withdrawn, and the present case was substituted. It was argued in last Hilary term (Jan. 25) by

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Maule and *J. Evans*, in support of the rate. The sessions have held that the articles contained in the second column of the schedule, are to be taken into consideration, in estimating the value at which the appellants' premises are to be assessed, and that decision is correct. It is intended to be argued that they constitute merely personal property, and distinctions are to be made between the chattels which go to the executor and the fixtures which go to the heir, and between the relative rights of landlord and tenant in regard to such property. But no such distinctions are to be attended to in determining the rate upon engines and machinery. The simple question is, whether the fixtures are practically used and occupied with the realty; for if so they are properly taken into the estimate when the realty to which they are attached is valued. *Rex v. St. Nicholas, Gloucester (a)*, *Rex v. The Hull Dock Company (b)*, establish that principle. Here the articles mentioned and described in the case are affixed to the freehold, and are used with it, and consequently are properly rated.

Sir *J. Campbell* A. G. and *Powell*, with whom was *E. V. Williams*, contra. It must be conceded that this machinery

(a) Cald. 262.

(b) 1 T. R. 219.

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was affixed to the freehold. It did not however thereby cease to be personal property. The articles in question would, as chattels, pass to the assignees of a bankrupt; *Storer v. Hunter* (a), *Trappes v. Harter* (b). They could be recovered in an action of trover, *Clark v. Crownshaw* (c), *Coombs v. Beaumont* (d); and they are such as would pass to the executor, and not to the heir, *Lord Dudley v. Lord Warde* (e), *Elhous v. Maw* (f), and *Rex v. Otley* (g). [*Cole-ridge J.* The authorities were all cited in *Wansborough v. Maton* (h).] Then if these articles are to be treated as personal chattels, they are not rateable, at least in this parish. It is true that by the 43 *Eliz.* c. 2, personal property might have been rated for the relief of the poor; but where it is so rated, which is an exceedingly rare occurrence, the rate is borne equally by all the inhabitants, whereas here it is expressly stated, that personal property is not charged to the poor-rate in this parish. Where the value of the land is in fact increased in consequence of something affixed to it, or some peculiar property possessed by it, and brought forth by the art and industry of man, that increased value is the proper rateable value, and the cases cited on the other side have so settled it. But here, in effect, it is sought to lay the rate upon the machinery, which does not increase the value of the land.

After the argument the COURT desired to see the rate itself, and said they would consider as to their judgment on the case. The rate was subsequently sent to the Court, and

Lord DENMAN C. J. in the ensuing Hilary term (Jan. 31) delivered the judgment of the Court.—This was an appeal against a rate, on the ground that many arti-

(a) 3 B. & C. 368; S. C. 5 D. &

R. 240.

(b) 2 Cr. & M. 153.

(c) 3 B. & Ad. 304.

(d) 5 B. & Ad. 72.

(e) Amb. 113.

(f) 3 East, 38.

(g) 1 B. & Ad. 161.

(h) 4 A. & E. 884.

cles of machinery, employed by the appellants in their manufactory, were personal property, and not subject to be rated. The sessions proposed numerous questions to us, but we did not think their statement so full as it might have been, and we desired to see a copy of the rate, in the hope that we might be enabled, from the description there given, to specify the articles that ought to be included. In this we are disappointed, and can only direct that the rate should finally stand on the general principle which we have lately had occasion to lay down (*a*), that real property ought to be rated according to its actual value, as combined with the machinery attached to it, without considering whether that machinery be real or personal property, so as to be liable to distress or seizure under a *fiery facias*; or whether it would descend to the heir or executor, or belong, at the expiration of a lease, to landlord or tenant.

The rate must therefore be sent back to the sessions to apply this principle.

(*a*) In *The King v. The Birmingham and Staffordshire Gas Light Company*, 1 N. & P. 691.

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and others.

Ex parte STOREY.—In the matter of Arbitration between W. H. STOREY, HUGH JAMES and RICHARD ROBINSON.

CROWDER, on a former day in this term, had obtained a rule nisi for setting aside a rule of Court made in Michaelmas term last, for making the agreement of reference a rule of Court, on the ground that the agreement for the arbitration contained a stipulation that the *award* and not the *submission to arbitration* should be made a rule of Court; against which cause was now shewn by Sir W. W. Follett, who relied on *Pedley v. Westmacott* (*b*), where the same objection had been made and overruled.

(*b*) 3 East, 603.

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A submission to arbitration contained a stipulation that the *award* not the *agreement* should be made a rule of Court:—Held, that the Court had jurisdiction under the 9 & 10 Will. 3, c. 15, and were authorized to make a rule of Court thereon.

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Crowder, in support of the rule. This Court derives its authority from the 9 & 10 Will. 3, c. 15, which empowers parties to agree that their submission should be made a rule of Court, and to insert such their agreement in their submission; which agreement, so made and inserted in their submission, shall, upon producing an affidavit thereof, be entered of record in the Court, and a rule shall be obtained thereon. It is only therefore where the agreement is contained in the submission that a rule of Court can be made. Such was the determination of the Court in *Anonymous* (a), and *Harrison v. Gundry* (b). It is true that *Pedley v. Westmacott* (c) is a decision the other way, but the former case was not cited therein, and it certainly is not consistent with the words of the statute. In — v. *Mills* (d) Lord *Eldon* held, that a parol submission was not within the statute; and in his judgment observed, “I have always understood that where an award is to be made a rule of Court, the submission that it shall be so must be in writing.” How can it be said that an *award* is the same as a *submission to arbitration*?

LORD DENMAN C. J.—This is an appeal to the statute. In *Pedley v. Westmacott* (c) Lord *Ellenborough* said, that the case of *Powell v. Phillips*, there cited, in which the submission had stated that the *award* should be made a rule of Court instead of the *agreement*, and it was held to be no objection, was the later and more sensible determination. We must agree with it.

PATTESON, WILLIAMS, and COLERIDGE Js. concurred.

Rule discharged with costs.

(a) 2 Barnard. K.B. 163.

(c) 3 East, 603.

(b) 2 Str. 1178.

(d) 17 Ves. 419.

END OF MICHAELMAS TERM.

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The mutuality of this contract consists in the forbearance by the assignee, being a condition precedent to any right to sue on the promise. *Morton v. Burn.* 297

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The declaration stated that the defendant was indebted to the plaintiff in 703*l.*, for goods previously sold, in consideration whereof, and of the plaintiff's selling him some sheets of wool at a certain rate, and in consideration that the plaintiff would give time to the defendant for the payment of the said sum of money, the defendant promised to pay the said sum, and the value of the wool to be delivered, by accepting a bill of exchange for the whole amount. There was an averment of the delivery of the wool, and that its value was 513*l.* 11*s.* 2*d.*; that the plaintiff did give time to the defendant for payment, and that the plaintiff tendered a bill for acceptance, but the defendant refused to pay by accepting the bill or otherwise, and that the whole aggregate sum remained unpaid. The first plea was, that the goods were above the value of 10*l.*, and that there was no note in writing or acceptance of any part of the wool so agreed to be sold and delivered. The second plea was, the wool was warranted of a supe-

rior quality; that it was of an inferior quality, and thereby was of no use to the defendant, who returned it:—Held, first, that each plea was a complete answer to the whole action, because there was a failure of part of the consideration for the promise; secondly, that the Court could not give judgment for the plaintiff, on the ground that, looking at the whole record, a good consideration and a good cause of action, to the amount of 703*l.*, the price of the wool previously sold, clearly existed, because in an action of assumpsit the defendant can only be made chargeable with the breach of the promise, as laid in the declaration. *Head v. Baldrey.* 217

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Where, in the affidavit to hold to bail, the sum sworn to be due was less than that indorsed upon the writ of capias, and a bail-bond was given in the latter sum, the Court ordered that the bail-bond should be cancelled, and that the defendant should enter a common appearance. *Cook v. Cooper.* 607

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CERTIORARI.

I. *Where it lies.*

1. Although an order of the Court of Quarter Sessions to estreat a recognizance for a forfeiture out of the sessions be a nullity, yet a certiorari will be awarded to remove it in order to quash it.—*The Queen v. The Justices of the West Riding of Yorkshire.* 457

II. *Where taken away.*

1. Section 128 of the Municipal Corporation Act (5 & 6 Will. 4, c. 76,) takes away the certiorari to remove an order of quarter sessions

on appeal against a borough rate.—*The Queen v. Justices of Ripon.* 411

III. *Practice in.*

Where one of several defendants has removed an indictment for conspiracy into K.B. by certiorari, and he alone has entered into the necessary recognizances, the Court will not award a writ of procedendo, or impose terms as to the other defendants taking short notice of trial, although by the practice of the Court the trial could not be pressed on against the other defendants, and great delay would probably take place. *The King v. Newton and others.* 121

CHANCERY.

Imprisonment for contempt of Court of.—See **SHERIFF**, 1, 2, 3.

CHAPEL.

Antiquity of presumed, after verdict.—See **RATE**, III.

CHURCH.

Repairs of church built under the Church Building Acts.—See **RATE**, III.

CHURCH-RATE.

When a township exempt from.—See **RATE**, III.

CHURCHWARDEN.

Signature of grounds of appeal by.—See **POOR**, IV. 1.
Return to mandamus to pay church-rate.—See **PLEADING**, I.

CLERK OF THE PEACE.

I. *Duty of.*

It is the duty of the clerk of the peace to put the law in motion to levy all recognizances forfeited at quarter sessions. *The Queen v. The Justices of the West Riding of Yorkshire.* 457

II. *Fees.*

1. The clerk of the session of gaol delivery of Newgate is not entitled to any fee in respect of convicts sentenced to imprisonment with hard labour. *The Queen v. Sir R. Baker.* 375
2. He is entitled to the fee usually paid at the time of passing the 5 Geo. 4, c. 84, in respect of convicts sentenced to transportation. *Ibid.*
3. The clerk of the session of Newgate, who continued in office up to 1780, received the sum of 6s. 2d. for every felon ordered to be transported: his successor in office received the same fee till the year 1805. From that year till the year 1829, when his successor was appointed, he received no such fee:—Held, that the non-payment of the fee during this period, unexplained in any manner, did not preclude the clerk of the session from making a claim for the fee usually paid under the 5 Geo. 4, c. 84, s. 4, and the Court granted a mandamus in order to ascertain whether any fee was usually payable at the time of the passing of that act. *Ibid.*

COMMISSION

*To examine Witnesses Abroad.*I. *Return to, what improper.*

1. A commission to examine witnesses at Hamburgh was directed to the Judges of the Chamber of Commerce of that city, or any two of them, who were directed to take the examinations in writing, and to send the same to the Court of K. B. under their seal. The original examinations were taken down by an officer of the Chamber of Commerce appointed for that purpose, and entered by him in the minutes of the Court, and these were signed by the judges:—Held, that a copy of the examinations, attested by the above officer, and under the seal of the Chamber of Commerce,

was not a proper return, or receivable in evidence.

Scemle, that when a commission to examine foreign witnesses is issued to another country, their answers returned to the Court of K. B. must be in English. *Clay v. Stephenson.* 189

II. *Continuance of.*

2. The commission directed the Chamber of Commerce, or any two of them, on or before the 11th July then ensuing, to examine certain witnesses. The Chamber of Commerce met on the 11th July, and appointed two commissioners to take the examinations, and on the 15th July following the commissioners met, and the witnesses appeared before them. *Scemle*, that the commission had continuance from the 11th July, as the Court would not intend that the witnesses were not summoned on the 11th, and the commission adjourned till the 15th. *Ibid.*

COMMON.

Inclosure from waste.—See LANDLORD AND TENANT, II.

Plea of common, when new assignment is necessary.—See PLEADING, VI.

COMPENSATION.

I. *To Officers under Municipal Corporation Act.*

Under the 66th section of the Municipal Corporation Act, (5 & 6 Will. 4, c. 76,) which directs that an adequate compensation shall be assessed and paid to town-clerks removed from office under that act, a party appointed whilst the bill was before parliament, though the appointment was in the usual form for life, is entitled to nominal compensation only upon being so removed. *Ex parte Lee.* 63

- II. As to the power of the Court of Queen's Bench to review decision of the Lords of the Treasury on

questions of compensation—See JURISDICTION, I.

CONDITION.

See DEVISE, II.

CONSIDERATION.

1. For agreement in restraint of trade.—See TRADE.
2. For promise to pay bond debt.—See ASSUMPSIT, III. 1.
3. Void in part, void for the whole, in assumpsit.—See ASSUMPSIT, III. 2.
4. Illegality of.—See BILLS OF EXCHANGE, I.

CONSOLIDATION,

Of quo warranto informations.—See QUO WARRANTO, IV. 1.

CONSTRUCTION.

1. Of the word *usual* in statute.—See CLERK OF THE PEACE, II. 3.
2. Of covenant to repair.—See DAMAGES, II.
3. Of the words *all my copyhold*, in devise.—See DEVISE, III.
4. Of contract.—See FRAUDS, I.
5. Of carriage, to include cabriolet.—See HACKNEY COACHES.

CONTEMPT.

Prisoner in custody for contempt, when dischargeable—See SHERIFF, I. 2, 3.

CONTRACT.

1. Void in part when void altogether.—See ASSUMPSIT, III. 2.
2. Between master and servant, what a sufficient breach of.—See MASTER AND SERVANT.
3. Executory, when to be considered as executed.—See CORPORATION, I. 2.
4. When not.—See MASTER AND SERVANT, 2, 3.

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5. Parol contract with corporation.—See CORPORATION, I. 1.

6. Relating to lands.—See FRAUDS, I.

CONTEMPT.

Imprisonment for.—See SHERIFF, 1, 2, 3.

CONVERSION.

As to conversion of bankrupt's goods, See BANKRUPT, II.

CONVICTION.

See JURISDICTION, I. 2.

COPYHOLD.

Admittance, when necessary:

1. Where the reversion in fee of a copyhold expectant on a life estate vests by devise in the tenant for life, who has been admitted as tenant for life, the life estate is merged, and another admittance in respect of the estate devised is necessary. *Doe v. Lawes.* 195
2. An heir-at-law to a copyhold may devise his reversion without admittance. *Ibid.*
3. *P.*, seised in fee of a copyhold, devised it to *S.* for life and died, the reversion descended on his son, who devised it to *S.*, the tenant for life, who had been previously admitted to the life estate, but who was never admitted to the estate in fee. By her will *S.* devised the estate in fee to *A.*, *B.* and *C.* jointly, the two latter of whom were her heirs-at-law. The three devisees were admitted each to an undivided third of the copyhold, to the uses of the will of *S.*—Held, that the admittance of the tenant for life did not do away with the necessity for another admittance on the descent of the estate in fee, and therefore that *S.* had not a devisable estate in the copyhold; but held also, that as *B.* and *C.* had been admitted to two-thirds of the copyhold,

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(although admitted as devisees,) yet, as they were the heirs of *P.*, the prior devisee, their admittance had relation to the will of the first devisor, and that they were entitled to two-thirds of the estate. *Doe v. Laves*, 195
 Construction of devise of.—See DEVISE, III.
 Revocation of.—See WILL, II.

CORPORATION.

I. *When it may be sued on a parol Contract.*

1. Assumpsit is maintainable against a corporation aggregate, without a head, on an executed parol contract.
2. Where goods have been sold to a corporation upon a contract of sale or return within a reasonable time, and the goods are detained an unreasonable time, the plaintiff may bring assumpsit for goods sold and delivered. *Beverley v. The Lincoln Gas Light and Coke Company*, 283

II. *Municipal Corporation.*

For compensation to officers under Municipal Corporation Act,—See COMPENSATION, I.—MANDAMUS, II.—JURISDICTION, I. 4.
 Jurisdiction over borough-rate.—See CERTIORARI, II.

III. *Councillors, how to be displaced.*

Dissolution of corporation by grant of quo warranto, influence of, on Court.—See QUO WARRANTO, II. 1, 2.

COSTS.

I. *On Rule for New Trial.*

Verdict for plaintiffs. Defendant had obtained a rule for a new trial; the rule contained no mention of costs. The plaintiff's attorney drew up the rule, and served it upon the defendant, upon which the defendant's attorney wrote to say that the defendant declined availing himself

of the privilege of the new trial. The Court, on the application of the plaintiff, discharged the rule for a new trial, and held the plaintiff entitled to sign judgment, and to the costs of the first trial. *De Riitzen v. Lloyd*, 213

II. *When the Court give judgment according to the right of the Case.*

In an action on the case against the sheriff, the declaration contained one count for an escape. The defendant pleaded, first, not guilty; secondly, that he the sheriff did not arrest the debtor of the plaintiff: issues on both pleas. At the trial it appeared that the sheriff had not made an arrest, but had negligently omitted to make an arrest. The judge refused to amend the record under the 3 & 4 Will. 4, c. 42, s. 23, but permitted the plaintiff to prove that the sheriff had negligently omitted to make an arrest. The jury found a verdict for the defendant on both issues, and, by the direction of the judge, specially found the omission to arrest, and assessed the damages at 30*l*. The finding was indorsed on the record. The Court of K. B. subsequently gave judgment for the plaintiff, according to the right of the case. The *postea* stated the verdict as to the issues and the negligent omission of the sheriff, and that according to the very right the plaintiff ought to have judgment to recover his damages, but was silent as to costs. It was held that the plaintiff was entitled to the general costs of the cause, but that the defendant was entitled to be allowed the costs of the issues, and that each party should pay his own costs of the motion to enter up judgment, according to the right and justice of the case. *Guest v. Elwes*, 230

III. *On New Trial.*

When the Court of K. B. grant a rule to set aside the trial and the verdict

in a cause that has been taken as undefended, on an affidavit of merits by the defendant, it is not the practice to make the payment of costs by the defendant *on a particular day* a condition in the rule. *Bland v. Warren.* 97

COUNCILLOR.

Municipal, how displaced.—See *MANDAMUS*, III.—*QUO WARRANTO*, I. 2.

COURT.

The power of the Court to amend record, where the jury have found the facts special.—See *AMENDMENT*, I.

To amend award.—See *ARBITRAMENT*, II. 2.

To review decision of judge in Bail Court.—See *JURISDICTION*, I. 1.

Court of Exchequer.—See *JURISDICTION*, II.

See *ECCLESIASTICAL COURT*. — *REQUESTS*, *COURT OF*.

COVENANT.

In restraint of trade.—See *TRADE*.

To repair.—See *DAMAGES*, II. 1.

CRIMINAL LAW.

Criminal information, as to the scandalous matter contained in affidavits of prosecutor.—See *AFFIDAVIT*, III.

Where one of several defendants removes indictment by certiorari, practice against the others.—See *CERTIORARI*, III.

Improper judgment delivered by inferior court.—See *JURISDICTION*, I. 2.

CUSTOM.

What is valid.

A custom for the parishioners of a parish to go through a house which is not on the boundary line, is bad.

Quare, whether a custom for the parishioners to enter a house for

the purpose of ascertaining the boundary, is good? *Taylor v. Davey.* 469

Custom of trade must be pleaded.—See *PLEADING*, V.

Where an act of parliament entitled a party to the fee *usually* paid, meaning of the word.—See *CLERK OF THE PEACE*, II. 3.

DAMAGES.

I. *Measure of, in Trespass.*

Where goods are taken under process which is illegally executed, and the owner pays a sum of money to release them, he is entitled to recover the amount so paid, and the measure of damages is not to be limited by the injury actually sustained. *Sowell v. Champion and others.* 627

II. *On Covenant to repair.*

In an action on a covenant to keep premises in repair during the tenancy, the jury may take into consideration the state of repairs at the commencement of the demise, in order to assess the damages for which the defendant is liable. *Burdett v. Withers.* 122

III. *Against Surety.*

Against surety, where the contract of principal has been broken.—See *GUARANTIE*, II.

IV. *Mitigation of Damages.*

The defendant cannot put in the copy of a work published by the plaintiff, unless to shew that such work came to his knowledge and provoked him to write the libel. *Watts v. Fraser.* 157

DEBT.

The right to maintain, by incumbent de facto, for tithes.—See *TITHES*.

DECLARATION.

Generally.—See *PLEADING*, II.

In ejectment.—See *EJECTMENT*, II.

DECLARATIONS.

1. Of agent.—See ESTOPPEL, IV.—EVIDENCE, III.
2. Of party in possession of land.—See EVIDENCE, II. 3.
3. Accompanying an act.—See EVIDENCE, V. 3.
4. Against the interest of the party.—See EVIDENCE, V. 1.

DEFENDANT.

When entitled to costs, though judgment against him.—See COSTS, II.
Where one of several entitled to acquittal in trespass.—See PRACTICE, V.

DE INJURIA.

Replication, when proper. — See PLEADING, VII. 1.

DEED.

Not varied by promise to pay debt due on, at a future day.—See ASSUMPSIT, III. 1.

DEFENCE.

Where special plea unnecessary.—See PLEADING, III. 5.

DEPOSIT.

Of a policy of insurance as a pledge.—See EXECUTOR, III.

DEVISE.

I. *Competency of Testator.*—See EVIDENCE, V. 2, 3.

II. *Conditional.*

Quære, whether a devise to E. C. for life, or for so long thereof as she shall continue sole and unmarried, is defeated by her subsequent marriage with the testator, he having contemplated marriage with her at the time of the will? *Marston v. Roe.* 504

III. *What Estate passes under.*

The following bequest in a codicil, "I give, devise, and bequeath to S. (the wife of the testator) *all my*

copyhold in H.," passes only a life estate in the copyhold property, the context not necessarily shewing that such was not the intention of the testator. *Doe v. Lawes.* 195

IV. *Revocation of.*—See WILL, I. II.

DISHONOR.

Of bill, notice of.—See BILLS OF EXCHANGE, II.

DISTRESS.

Where made by Party not entitled.

1. *Quære*, where a distress had been made for rent in arrear by a party claiming as landlord, whether a ratification of the distress by the party really entitled, after plea pleaded, is sufficient? *Taylorson v. Peters.* 622
2. Right of landlord to distrain more than six months after the tenancy is determined.—See LANDLORD AND TENANT, III. 1.

DOWER.

Quære, whether a will made by a testator in contemplation of marriage, in which he devises certain real estate to his future wife for life, operates to bar her right to dower, under 1 Vict. c. 26. *Marston v. Roe.* 504

DUPLICITY.

Plea bad for.—See PLEADING, II. 2.

ECCLESIASTICAL COURT.

Practice of, in granting probate.—See EVIDENCE, VII. 1.

EJECTMENT.

I. *As to Right to maintain, after 20 Years' Possession, under 3 & 4 Will. 4, c. 27.*—See ADVERSE POSSESSION.

II. *Description of Lands in Declaration.*

Lands sought to be recovered in ejectment, were described in the declaration, as "situate in the county of S." without any other

local description.—Held, on motion in arrest of judgment (*Little-dale J. dubitante*), that the declaration was good. *Doe v. Gunning*. 260

III. Title by Estoppel.—See ESTOPPEL, I.

IV. Practice in.

A term's notice of trial, when necessary.—See PRACTICE, IV. 1.

Where a party has been put in possession by a *hab. fac. poss.* irregularly issued.—See RESTITUTION.

ELECTION.

Of officers in municipal corporations, where the revision of burgesses was ill made.—See MANDAMUS, III.—
QUO WARRANTO, II. 2.

ERASURE.

On bill of exchange.—See BILLS OF EXCHANGE, III.

ERROR.

In judgment on indictment for felony.—See JURISDICTION, I. 2.

ESCAPE.

Liability of sheriff for, on neglect to arrest.—See COSTS, II.

ESTATE.

Sufficient to obtain a settlement.—See POOR, III.

Words to pass—See DEVISE, III.

ESTREATS.

Power of the Exchequer to estreat.—See JURISDICTION, II.

Duty over.—See CLERK OF THE PEACE, I.

Mode of estreating.—See JURISDICTION, III.

ESTOPPEL.

1. *Estoppel of Tenant by Declaration of Party through whom he takes.*

J. B. conveyed Blackacre in fee to L. in 1827, and the wife of J. B. was a party to that deed. It was

agreed at the time of executing the conveyance, that *J. B.* should continue to occupy till he or *L.* died. *L.* died, and his heir gave *J. B.* notice to quit. A few days after the notice to quit expired, *J. B.* died, and his widow continued in possession. On ejectment brought by the heir against the widow:—Held, that she could not set up a prior mortgage of Blackacre by *J. B.*, for her possession accrued through *J. B.*, and therefore she was estopped by the conveyance of 1827. *Doe v. Shirrow*. 123

II. By Acquiescence of Party.

Goods in the possession of *A.* were seized in execution, and while they were in the custody of the sheriff the plaintiff came twice to the premises, but made no claim to them; the plaintiff saw several times the defendant's attorney, and told him that he was a creditor of *A.*, but did not state that he had any mortgage on the goods, or that he had any claim to them, and he asked the attorney's advice as to the best course to be pursued; the attorney, after giving some advice, stated that the defendants were about to purchase the goods from the sheriff. The defendants having purchased accordingly, in an action of trover brought by the plaintiff as *bonâ fide* mortgagee of the goods:—Held, that it was a question for the jury, on an issue that the plaintiff was not possessed of the goods, whether the plaintiff by his conduct had not estopped himself from disputing the sale. *Pickard v. Sears and another*. 483

III. *Where Tenant not estopped*:—See LANDLORD AND TENANT, IV.

IV. On Shipowners, by Bill of Lading.

In an action by *B.*, the consignee of a bill of lading, against *W.*, *N.*, and *C.*, shipowners, for not delivering the cargo, it appeared that *W.* was the consignor, and was

also the general agent of *B.* the plaintiff:—It was held that *W., N.,* and *C.*, the shipowners, were not estopped by the bill of lading given by the master of the ship, and acknowledging a cargo on board, from shewing that no cargo was actually shipped.—*Berkley v. Watling.* 178

V. *On Churchwardens and Overseers, by their Signatures to Notice of Appeal.*—See *POOR*, IV. 2.

VI. *On Parties who have taken part at a void Election.*—See *QUO WARRANTO*, III.

EVIDENCE.

I. *On whom the Burden of Proof.*—See *ONUS PROBANDI*.

II. Admissions.

1. Of assets, by executor.—See *EXECUTOR*, III.

2. In pleadings.—See *BILLS OF EXCHANGE*, III.—*PLEADING*, VII. 2.

Of Party in possession of Lands.

3. Lands in *C.* were devised to trustees for absolute sale, in trust to purchase other lands at *A.*, and to permit *W. D.* to receive the rents of the so purchased lands for his life, with remainders over. *W. D.* granted an annuity arising out of certain lands (*C.* amongst others), and in the annuity deed recited the above will—that the trustees had not sold the lands in *C.*, and that the trustees had permitted him to receive the rents. In an ejectment brought by the trustee under the will for the lands in *C.*, *W. D.* having been shewn to be in receipt of the rents and profits during his lifetime:—Held, that the annuity deed was admissible in evidence, as containing a declaration by *W. D.* that he did not hold in fee. *Doe v. Coulthred.* 165

III. *By Declaration of Agent.*

In an action of trover against the

sheriff for taking the goods of the plaintiff, an affidavit made by the officer under the Interpleader Act, respecting the said goods, is admissible in evidence to prove that the officer who seized the goods is the servant of the sheriff. *Brickill v. Sir C. Hulse.* 426

IV. *Evidence of Hand-writing.*

1. Evidence as to hand-writing formed by the witness called on an immediate comparison at the trial, is inadmissible. *Doe v. Suckermore.* 16

2. Where the signature of an attesting witness to a will was in dispute, and the witness, who was alive and called as a witness at the trial, admitted that certain specimens put into his hand were of his writing, and that signatures made to depositions in the Ecclesiastical Court were also his, an inspector at the bank, skilled in hand-writing, who had gained a knowledge of the witness's hand-writing, by inspection of these admitted specimens before the trial, was called to prove that the attestation to the will was not in the hand-writing of the witness. The evidence was held to be admissible per Lord Denman C. J. and *Williams J.*, inadmissible per *Patterson* and *Coleridge Js.* *Ibid.*

V. *Hearsay.*

1. *On a Question of Highway.*

Indictment for obstructing a highway. Plea: Not guilty. A witness stated that, about forty years ago, a deceased occupier of land over which the road passed, planted a willow near the road. The witness was then asked, what [the occupier said when he planted the willow? The witness answered, that "the occupier said that he planted the willow to shew where the boundary of the road was when he was a boy." It was held that the statement of the occupier was

not receivable in evidence, on the ground that it was evidence of reputation, or as a declaration accompanying an act done, or as a declaration against the interest of the party making it. *The Queen v. Bliss.* 464

2. *On a Question of Competency.*

1. On a question as to the competency of a deviser to make a will, letters addressed to him found after his death open, with the seals broken, in a cupboard under his bookcase in a private room, together with other letters indorsed by the testator, and to some of which answers had been written by him, are not admissible in evidence; per *Tindal C. J., Parke B., Bosanquet J., and Coltman J.*; as there was nothing to shew any knowledge or act of the testator with regard to them; dissentientibus, *Park J. and Gurney B. Wright v. Doe d. Tatham.* 305

3. *Declarations accompanying an Act.*

1. On an issue between an heir at law and a devisee, where the question was, whether the testator's will had been revoked by his marriage and the birth of a child, prior wills of the testator are admissible in evidence; as are also declarations previous to his will relating to the dower of a future wife. *Marston v. Roe.* 504
2. A letter addressed to the testator, requesting him to communicate on a matter of business with his attorney, and found with the other letters, indorsed by the attorney who lived some miles off, is admissible in evidence, as it shews an act done upon it by the testator; per *Tindal C. J., Park J., and Gurney B.*; dissentientibus, *Parke B., Bosanquet J., and Coltman J. Wright v. Doe d. Tatham.* 305

VI. *Of a Provisional Assignment.*

A copy of a provisional assignment,

entered as a proceeding of the Insolvent Debtors' Court, under the 1 Geo. 4, c. 119, ss. 4 & 7, is admissible in evidence under the 7 Geo. 4, c. 37, s. 76, and it is not necessary to shew that the prisoner who made the assignment was adjudged entitled to his discharge. *Doe d. Ellis v. Hardy.* 402

VII. *Of the Title of Executors.*

1. The production of the original will with the act of the Ecclesiastical Court ordering probate, is sufficient evidence of the title of an executor, without accounting for the non-production of the probate. And where, by the practice of an Ecclesiastical Court, no book was kept, but grants of probate were recorded by a minute indorsed on or entered at the foot of the original will, and written by the officer of the Court:—Held, that the production of the original will with such minute upon it, was sufficient evidence of the executor's title. *Doe v. Gunning.* 260
2. As to the stamp on an exemplification of letters of administration, —See STAMP, I. 2.

VIII. *Of a Tender.*

A tender was made in these words: "I have called to tender 8*l.* in settlement of *R.*'s bill." It was held, that as the meaning of the words was ambiguous, it was for the jury to consider whether the tender was conditional. *Eckstein v. Reynolds.* 256

IX. *On Bills of Exchange.*

1. Post-dated.—See STAMP, II.
2. Alteration of.—See BILLS OF EXCHANGE, III.
3. Illegality of consideration. —See BILLS OF EXCHANGE, I.

X. *Of Evidence in Mitigation of Damages.*

In an action of libel, the defendant cannot, in mitigation of damages,

put in newspapers deposited at the stamp office under 38 *Geo.* 3, c. 78, s. 17, containing libels on himself by the plaintiff, for non constat that any such newspapers were published or came to the knowledge of the defendant. *Watts v. Fraser.* 157

XI. *Improper Evidence received.*
Time for making objection to.—See **STAMP, II.**

XII. *Miscellaneous.*
Of a fee usually paid.—See **CLERK OF THE PEACE, II. 3.**
Of permissive waste by tenant.—See **LANDLORD AND TENANT, IV.**
Of a manor.—See **MANOR.**
Commission to examine witnesses abroad.—See **COMMISSION.**
Return to.—See **COMMISSION.**
Continuance of.—See **COMMISSION.**

XIII. *Evidence on several Issues.*
Evidence on one issue not applicable to another.—See **ATTORNEY, III.**

EXECUTION.

Of legal process in an irregular manner.—See **ATTORNEY, III.**

EXECUTION CREDITOR.

Rights of.—See **INTERPLEADER.**

EXECUTOR AND ADMINISTRATOR.

I. *Proof of Title of.*
See **EVIDENCE, VII.**

II. *Admission of Assets.*
See *infra*, III.

III. *Right to retain.*

A party who had insured his life deposited the policy with *R.*, to secure a sum of money advanced, but did not assign it, and died, leaving *R.* and another his executors. *R.* applied to the insurance-office for payment, but they refused to pay except the executors

signed the receipt in their character of executors: Whereupon, under protest, *R.* and the other executor signed the receipt in that form, and received the proceeds: Held, that the money received from the office was only assets in the hands of the executors, to the extent of what remained after satisfying *R.*'s lien. *Glabbe v. Rowntree.* 557

IV. Actions by.

1. A party who had worked into his neighbour's land, and dug coal, which he had sold, retaining the proceeds, died intestate:—Held, that an action for money had and received by the intestate was maintainable against his administratrix for the value of the coal so disposed of; such remedy being independent of the statute 3 & 4 *Will.* 4, c. 42, s. 2, and not affected thereby.
2. An action of trespass had also been brought under that statute for the trespasses during the six months prior to the decease of the intestate, in which a verdict had been obtained:—Held, that the plaintiff had not thereby precluded himself from the action for money had and received in respect to the previous working. *Powell v. Rees.* 571

FEB.

Words to pass.

See **DEVISE, III.**

FEEES.

What Fees the Clerk of the Peace is entitled to.

See **CLERK OF THE PEACE, II.**

FRANCHISE.

See **MARKET.**

FRAUDS, STATUTE OF.

I. *Promise relating to Lands.*

A declaration in an action of as-

sumpsit stated that the plaintiff was desirous of taking a furnished house as a school; that the defendant was possessed of a house in part furnished; and all other furniture necessary for the completely furnishing the same; and thereupon, in consideration that the plaintiff, at the request of the defendant, would take possession of the said house so partly furnished, and would, if the furniture necessary for the completely furnishing the said house, for the purpose aforesaid, should be sent into the said house by the defendant within a reasonable time, become the tenant of the defendant of the said house, with all the furniture aforesaid, at the rent aforesaid, and pay the rent quarterly, commencing &c. The defendant promised the plaintiff that he, the defendant, would, within a reasonable time after the plaintiff should have so taken possession of the same house and premises, send into the said house and premises all the furniture necessary for the completing of the furnishing of the said house with furniture of good quality. There was then an averment that the defendant took possession of the house; and the breaches of the promise stated were, that the articles of furniture sent into the said house were not of good quality, and that all the furniture necessary for the completing of the furnishing of the said house was not sent in. Plea, that there was no note or memorandum in writing of the promise stated in the declaration. It was held, on demurrer, that the promise stated in the declaration related to land, and that as there was no note or memorandum in writing, no action could be maintained upon it. *Head v. Baldrey*.

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II. *Parol Evidence to shew Land bought as an Agent.*

See PRINCIPAL AND AGENT, I.

III. *Representation as to the Ability of another.* (9 Geo. 4, c. 14.)

B. was indebted to the defendant in a large sum for goods, and the defendant, in August, refused to supply any more, unless she commenced liquidating her account by weekly payments. In the month of October he actually discontinued any further supply; but *B.* having reduced her account about one half, he recommenced supplying her. In November the plaintiff made an application to the defendant as to the credit of *B.*, by whom the reference was given to the defendant, who gave a good character of *B.* Upon this the plaintiff supplied *B.* with goods, which she disposed of under prime cost, and applied the greater part of the proceeds in discharging her debt to the defendant. In an action, for money had and received, by the plaintiff against the defendant, on the ground that the goods had been obtained by fraud—Held, that the defendant's representation not being in writing, was inadmissible, under 9 Geo. 4, c. 14. *Haslock v. Fergusson*. 269

GAOL.

Fees under the Gaol Act (5 Geo. 4, c. 84,) to Clerk of the Peace.—
See CLERK OF THE PEACE, II.

GAMING.

Gambling securities.—See BILLS OF EXCHANGE, I.

GOODS SOLD & DELIVERED.

May be maintained, when goods are sold on sale and return, by parol,

to a corporation, and are not returned.—See CORPORATION, I. 2.

GRANT.

Of an incompatible office.—See OFFICE, II.

GUARANTIE.

I. *What is a Representation of the Ability of another.*—See FRAUDS, III.

II. *Liability of Surety where Contract has been broken.*

The defendant was a surety by bond to the plaintiffs for the due performance of a contract by S., according to a certain agreement. By that agreement S. was to complete the works for a certain sum, and payment was to be made to him by the plaintiffs during the continuance of the work by instalments, viz. three-fourths of the cost of the work certified to have been done every two months, and the remaining one-fourth one month after the whole was completed. S. applied for and received advances from the plaintiffs exceeding in amount the value of the work done by him, for some of which advances he gave security. The work not being done at the specified time, the plaintiffs called in another builder to complete the work, and the amount paid to him, added to the advances made to S., greatly exceeded the original contract price, but, added to the value of the work done by S., was something under the contract price. In an action against the surety on the bond, to which there was a plea of non est factum—Held, first, that the defendant might shew, in reduction of damages, that the advances were made by the plaintiffs not according to the contract, and that as the work had been completed within the contract price, the plaintiffs were only entitled to

nominal damages; and, secondly, that it would have been improper to plead non damnificatus. *Warre v. Calvert.* 126

HACKNEY COACHES.

1. A power given by a local act to the vestrymen of a parish, to "direct and regulate such stands for hackney coaches and chairs as they in their discretion shall think fit," within its limits, is not superseded by the provisions of 1 & 2 Will. 4, c. 22, (commonly called the Hackney Coach Act,) although such stands be within the distance of five miles from the General Post Office. *Frost v. Williams.* 475
2. The 35 Geo. 3, c. lxxiii. (local), empowers the vestrymen of the parish of St. Marylebone to direct and regulate stands for hackney coaches within that parish. The 57 Geo. 3, c. xxix. s. 65, (commonly called the Street Act, or Michael Angelo Taylor's Act,) enacts, that "if any person shall set out, lay or place any coach, cart, wain, waggon, dray, wheelbarrow, handbarrow, sledge, truck, or other carriage, upon any carriage way, (except such coaches and chairs as shall be hereafter licensed by the commissioners for regulating and licensing hackney coaches, chariots and chairs, and which stood for hire according to the statutes and bye-laws made for those purposes,) it shall be lawful for persons appointed by the commissioners, or trustees or other persons having the control of the pavements in any parochial or other districts, without any warrant or other authority than this act, to seize such coach, &c." By sect. 137 it is declared that the powers conferred by this act on commissioners and trustees extend to vestrymen and others having the control of the pavements. Plaintiff was the licensed proprietor of a

cabriolet and horse, which were standing for hire at a stand prohibited by the rules and regulations for the standing of hackney coaches in Oxford Street, set forth and ordered by the vestrymen of St. Marylebone, who have the control of the pavements in that parish. The defendants, acting under the employment of the vestrymen, seized the cabriolet and horse:—Held, that by virtue of the provisions of these acts they were justified in so doing. *Frost v. Williams.* 475

HEARSAY.

See EVIDENCE, V.

HEIR.

See COPYHOLD, 1, 2, 3.

HEREDITAMENT *Incorporeal.*

Attempt to demise without deed.—

See STAMP, I.

HIGHWAY.

Evidence of reputation as to.—See EVIDENCE, V. 1.

HIRING AND SERVICE.

See MASTER AND SERVANT.

ILLEGALITY.

Of covenant in restraint of trade.—

See TRADE.

IMPERTINENCE.

See AFFIDAVITS, III.

IMPRISONMENT.

For contempt of Court.—See SHERIFF, 1.

Fees to clerk of the peace, on prisoners sentenced to.—See CLERK OF THE PEACE, II.

INCLOSURE OF WASTE.

See LANDLORD AND TENANT, II.

INDICTMENT.

See CRIMINAL LAW.—JURISDICTION, I. 2.

INSOLVENT.

Proof of provisional assignment.—
See EVIDENCE, VI.

INSURANCE.

I. Implied warranty by Ship-owner.

The unseaworthiness of a ship, which is implied in policies of insurance, applies to the commencement of the voyage, and is not extended in time more than other policies, to the continuance of the voyage.—*Broderick v. Hollingsworth.* 608

II. Effect of Negligence of Crew to Ship-owner.

To a declaration on a policy of insurance on a ship for twelve months, which alleged a loss by the perils of the sea, the defendant pleaded, that during the time the ship was insured, and before the loss, the ship was greatly broken, shattered, and unseaworthy, but the same, by reasonable care and diligence, and for a small cost, might, and could and ought to have been repaired by the plaintiff, and rendered seaworthy; yet the plaintiff, well knowing the premises, neglected to repair the ship, and she remained unseaworthy until the loss:—Held, that the plea was bad on demurrer, because, even if gross negligence on the part of the captain and crew and the ship-owner, through which the loss occurs, be a defence to an action on the policy, still this plea did not disclose any knowledge on the part of the assured of the unseaworthiness or the power of repairing the ship, nor did it appear that the loss occurred in consequence of such neglect. *Broderick v. Hollingsworth.* 608

Quære, whether such fact would con-

stitute any defence? *Broderick v. Hellingsworth.* 608

INTERPLEADER ACT.

Rights of Execution Creditor.

Where the claimant appeared on an application by the sheriff, under the 1 & 2 Will. 4, c. 58, s. 6, but the execution creditor did not, the Court ordered the sheriff to withdraw from the possession forthwith, and that he should be discharged from all proceedings by the execution creditor, in respect of such seizure, but refused to bar the claim of the latter against the claimant. *Doble v. Cummins.* 575

JUDGE.

Power of, in Bail Court.—See JUBIDITION, I. 1.

Power to amend nisi prius record.—See AMENDMENT, I.

JUDGMENT.

Entered up according to the right of the case.—See COSTS, II.

JURISDICTION.

I. *Of the Court of Queen's Bench.*

1. *Over Decisions of the Bail Court.*

A rule in the Bail Court will not be permitted to be re-opened and argued in the full Court in the term after judgment has been pronounced, although the judge who heard the case sanctions the application to the full Court. *Todd v. Jeffery.* 443

2. *Over the Records of an inferior Court when Judgment has been pronounced.*

If an inferior Court pronounce an improper judgment in a case of felony, the Court of King's Bench, on a writ of error being brought, has not power either to remit the record to the inferior Court, in order that the right judgment may be awarded there, or to pronounce

the right judgment itself; but the prisoners must be discharged.—*Bourne v. The King.* 248

3. *Over Removal of Indictments.* See CERTIORARI, III.

4. *Over the Decision of the Lords of the Treasury.*

Whether the Court of King's Bench has power to revise the decision of the Lords of the Treasury, upon a claim of compensation under the Municipal Corporation Act, *quære.* *Ex parte Lee.* 63

5. *Over Attornies, to compel them to give up Securities.* See ATTORNEY, I. 2.

6. *Over Decisions of the Quarter Sessions.*

1. The Court of King's Bench has no jurisdiction to direct the Court of Quarter Sessions to rehear an appeal, on the ground of their having rejected evidence which was admissible, although the appeal was against a conviction under the Game Act (1 & 2 Will. 4, c. 32), by which a certiorari is taken away. *Ex parte Pratt.* 102

2. Nor over decisions on a borough rate.—See CERTIORARI, II.

7. *Over Records of their own Court.*

Power of the Court to amend record where the jury have found the facts specially.—See AMENDMENT, 1.

8. *Over Awards.* See ARBITRAMENT, III.

II. *Jurisdiction of the Court of Exchequer.*

Since the 3 Geo. 4, c. 46, the Court of Exchequer has no jurisdiction over recognizances forfeited either before justices out of sessions or at the sessions. *The Queen v. The Justices of the West Riding of Yorkshire.* 457

See CLERK OF THE PEACE, I.

III. *Of the Court of Quarter Sessions.*

The Court of Quarter Sessions has no authority to order a recognizance to keep the peace to be estreated, where the alleged forfeiture of the recognizance has not taken place at the sessions. The proper course in such a case is to remove the recognizance into one of the superior Courts, and proceed by *scire facias*. *The Queen v. The Justices of the West Riding of Yorkshire.* 457

LANDLORD AND TENANT.

I. *Creation of Tenancy.*

1. Between mortgagee and tenant.—
See USE AND OCCUPATION.

Agreement not a Lease.

2. The following instrument in writing was held to be an agreement for a lease, and not a lease. An agreement made &c., between &c., *H.* agrees to make and execute to *E.* a good and valid lease of all that messuage, to hold to the said *E.*, his executors and assigns, for the term of seven years, from the 24th day of June next, at and under the yearly rent of 10*l.* clear of all taxes and assessments, (except the land tax,) payable half yearly, the first half-yearly payment to be made on the 25th day of December next. And it is hereby agreed that the said lease shall contain a covenant on the part of the said *E.* to pay the said rent; also to keep the said premises in repair (damages by fire excepted); also a proviso for re-entry on non-payment of the said rent by the space of twenty-one days after the same shall become due, or on non-performance of any of the covenants on the lessee's part to be performed. And the said *E.* agrees to accept of such lease as aforesaid, upon the terms and conditions above specified, and to execute a counterpart

thereof. And the said *E.* further agrees (when and so soon as the messuages or dwelling-houses, or either side of the said messuage hereby agreed to be demised, shall become tenanted and occupied,) to pay to the said *H.* an additional yearly rent of 15*l.* during the remainder which shall be thenceforth then to come of the said term of seven years. And the said *H.* agrees, on or before the 24th day of June next, to erect eight light panels in front of the drawing room windows, and fence blinds to same windows, to paper the hall and staircase, and all the rooms, save those on the basement and attics; also to place, set, and fix a range in the kitchen, with boiler and oven, and stoves in all the rooms having fire-places; also to fix and hang bells and knocker on the front entrance door, to complete the pantry windows, and lay on the water, and to paint, in imitation of marble, the chimney-pieces in the dining and drawing rooms. And it is hereby agreed, that by the said lease hereby agreed to be granted, the rent therein reserved shall be 120*l.*, and that by a separate deed to bear date the day next after the said indenture of lease, the said *H.* shall release to the said *E.* out of the said annual rent of 120*l.* the annual sum of 15*l.* Witness our hands. The said *E.* to prepare lease at his own cost, to be approved of by lessor's solicitor. *Rawson v. Eicke.* 423

3. Instrument of demise not void, though it attempt to demise an incorporeal hereditament, by writing not under seal.—See *Pooz*, III. 2.

II. *Determination of Tenancy.*

The defendant had encroached upon the lord's waste, and had occupied it with the lord's knowledge, without interruption, for ten years. A day or two before serving a declaration in ejectment, the lord en-

tered and broke down the defendant's inclosure :—Held, that if there was sufficient evidence for the jury to preserve a licence, this act was a sufficient countermand. *Doe d. Beck v. Heakin.* 660

III. *Rights of Landlord, to distrain.*

1. Where a tenant of a farm gave up possession of the house to the incoming tenant (the land having been previously given up) a few days after the determination of the demise, and left a cow and some pigs on the premises without leave of the incoming tenant :—Held, that so doing did not constitute a continuance in possession, so as to entitle the landlord to distrain under 8 Anne, c. 14, ss. 6 and 7. *Taylorson v. Peters.* 622

Against Tenant for Waste.

2. A declaration alleged, that a tenant from year to year wrongfully felled, cut down and destroyed the trees growing on the premises, and otherwise used the premises in so untenable and improper a manner that they became and were dilapidated, and in bad order and condition :—Held, that this imported a charge of voluntary waste, and was not supported by evidence of permissive waste only.

Whether a tenant from year to year is liable for permissive waste, *quære.* *Martin v. Gilham.* 568
Measure of damages for not repairing.—See DAMAGES, II.

IV. *Rights of Tenant, to dispute Landlord's Title, when.*

- A. demised lands to B., and afterwards executed a deed of trust, whereby he conveyed all his property to trustees for the benefit of his creditors. After the execution of the deed of trust, a fiat of bankruptcy issued against A. The trustees of A. informed B. of the

conveyance, and required him to attorn tenant to them. He at first refused to acknowledge their title, but afterwards paid to them one shilling by way of acknowledgment, and subsequently paid the trustees the rent for the current half year. They then proposed to raise his rent; and on his refusing to pay any additional rent, gave him a notice to quit; whereupon he signed a memorandum, in which he agreed to give up the possession to them :—Held, under these circumstances, that neither he nor the assignees of the bankrupt, who defended as his landlords, were prevented from shewing, in an action of ejectment by the trustees, that they had no title in consequence of the bankruptcy. *Doe d. Plevin v. Browne.* 592

Rights required by tenant at will after 20 years' possession without paying rent.—See ADVERSE POSSESSION.

Declarations of tenant, where not receivable.—See EVIDENCE, V. 1.

LAPSE.

When not incurred by patron of advowson.—See ADVOWSON, 1.

LEASE.

Whether an instrument be an agreement or a lease.—See LANDLORD AND TENANT, I. 2.

When attornment may be disputed.—See LANDLORD AND TENANT, IV.

LIBEL.

1. Right of defendant to set off counter libel.—See DAMAGES, IV.
2. Proof of publication.—See EVIDENCE, X.

LICENCE.

To inclose waste, how revoked.—See LANDLORD AND TENANT, II.

LIEN.

Of executor on a mortgage of his testator.—See EXECUTOR, III.

LIMITATIONS, STATUTE OF.

No estate gained by 20 years' possession under 3 & 4 Will. 4, c. 27, where the possession terminated before the act passed.—See ADVERSE POSSESSION.

LORDS OF THE TREASURY.

Whether their decision receivable by the Court of Queen's Bench.—See JURISDICTION, I. 4.

MANDAMUS.

I. *Where it lies.*

Against Trustees of Savings' Banks.

1. Where money belonging to the depositors in a savings' bank has been embezzled, the remedy of the depositors is not by action against the trustees and managers, but by mandamus to compel them to appoint an arbitrator, under s. 45 of 9 Geo. 4, c. 92. *Rea v. Trustees of the Mildenhall Savings' Bank.* 278

2. To ascertain the facts on which a party's right under a statute accrues.—See CLERK OF THE PEACE, II. 3.

II. *Where it does not lie.*

1. Where the right to compensation, under a statute, is purely nominal, the Court will not grant a mandamus. *Ex parte Lee.* 63
2. Where an office is full, and quo warranto is the proper remedy.—See QUO WARRANTO, I.

To rehear an Appeal.

3. Where the quarter sessions have decided to reject evidence.—See POOR, V. 1.
4. Or upon the evidence.—See JURISDICTION, I. 6.

5. To a late officer of Court of Requests, where money has been properly deposited in his hands.—See REQUESTS.

6. Where a person has been declared duly elected a councillor, and has made the declaration prescribed by the 6 & 7 Will. 4, c. 76, s. 50, and has been admitted into the council, the Court will not grant a mandamus to two councillors to administer the declaration to another person who claims to have been duly elected instead of the former. *The Queen v. The Councillors of the Borough of Derby.* 589

III. *Practice in.*

When, on a disputed municipal election, two of the candidates obtain a rule nisi for a mandamus to admit, and afterwards a rule nisi for a quo warranto against the parties admitted, the rule for the mandamus will not be as a matter of course discharged. *Rea v. The Mayor &c. of Winchester.* 274

MANOR.

What is Proof of.

Proof of holding a court-baron by the lord of the manor (father of the plaintiff) thirty-five years before action brought, and of deputations of gamekeepers by him, also proof of holding of meetings professing to be courts, and appointment of gamekeepers by the plaintiff in recent years, is *prima facie* evidence of a manor without producing Court Rolls, or any documentary evidence. *Doe d. Beck v. Heakin.* 660

MARKET.

Removal of.

1. The owner of a market may remove it to any convenient place within the manor, but if, upon removal, he disposes of the new site of the market and soil, so as to pre-

- vent himself from having the control of the market, the removal is void, *The King v. Starkcy.* 169
2. If the grantee of a market remove it to an inconvenient place, the public may use the old market, and it is not necessary to proceed by sci. fa. to repeal the grant. *Ibid.*
3. *Semble*, that the lord of a market cannot claim stallage as of common right, when none had been previously paid. *Ibid.*

MARY-LE-BONE.

Power of vestry of, to make regulations for cabriolets.—See HACKNEY COACHES.

MASTER AND SERVANT.

1. *Remedy by Servant against Master.*

1. A schoolmaster retained the plaintiff as a teacher of the French language on a yearly engagement, at a certain salary, with board and lodging, and dismissed him for absenting himself two days. In an action for salary, the defendant pleaded that the plaintiff wrongfully absented himself an unreasonable time, to wit, two days:—Held, after verdict for the defendant, not to be sufficient reason, as it shewed neither moral misconduct nor any injury accruing to the defendant from the absence of the plaintiff. *Fillicul v. Armstrong.* 406

2. Where a servant was retained for a year, his wages to be paid quarterly, he was dismissed at the end of a month from the commencement of the second quarter; he then, before the expiration of the quarter, brought an action of indebitatus assumpsit for work and labour; money was paid into Court sufficient to satisfy for the work done:—It was held, that the defendant was entitled to a verdict, as at all events the plaintiff could not maintain an action until the

end of the quarter. *Smith v. Hayward.* 432

3. *Semble*, an action of indebitatus assumpsit for work and labour done, cannot be maintained by a servant, although he may have been ready and willing to perform the labour, and may have been improperly dismissed from the service. *Ibid.*

II. *Contract between.*

A contract to serve as a reporter to a newspaper one whole year, from a certain day, and so from year to year, to the end of each year commenced, so long as the parties shall respectively please, is a yearly service so long as it lasts, and cannot be terminated except at the end of any current year. *Williams v. Byrnc.* 139

MERGER.

Of life estate in fee—See CORYHOLD, 1.

MITIGATION OF DAMAGES.

Right of defendant in libel to set off counter-libel.—See DAMAGES, III.
—EVIDENCE, X.

MONEY HAD AND RECEIVED.

Right to maintain by executor on a waived tort, to testator's freehold.
—See EXECUTOR, IV. 1.
Not waived, by action of trespass.—
See EXECUTOR, IV. 2.

MORTGAGE.

Equitable, of a policy.—See EXECUTOR, III.

MORTGAGOR AND MORTGAGEE.

Right by mortgagee to maintain use and occupation.—See USE AND OCCUPATION.

MUNICIPAL CORPORATION.

See CORPORATION, II.

NEGLIGENCE.

1. Of sheriff.—See **COSTS**, II.
2. Of crew.—See **INSURANCE**, II.

NEW ASSIGNMENT.

Where necessary.
See **PLEADING**, VI.

NEWGATE.

Fees of the clerk of the session of
gaol delivery, under the Gaol Act.
—See **CLERK OF THE PEACE**, II.

NEWSPAPER.

Publication of.—See **EVIDENCE**, X.
Contract of reporter for.—See **MASTER AND SERVANT**, II.

NEW TRIAL.

I. Where Damages under £20.

The Court will not grant a new trial
on the ground that the verdict, the
amount whereof is under 20*l.*, deter-
mines a question affecting the
interest of a large district. *Swell*
v. Champion. 627

II. Costs of.

Condition to be imposed.
See **COSTS**, III.

NISI PRIUS RECORD.

See **AMENDMENT**, 1.

NOMINAL DAMAGES.

See **GUARANTEE**, II.

NON COMPOS MENTIS.

See **EVIDENCE**, V. 2.

NOTE.

See **BILLS OF EXCHANGE**.

NOTICE.

1. Of dishonour.—See **BILLS OF EXCHANGE**, II.
VOL. II.

2. Of action against sheriffs.—See **SHERIFF**, 3.
3. Of trial.—See **PRACTICE**, IV. 1, 2.
4. Of act of bankruptcy.—See **BANKRUPT**, II.
5. Of grounds of appeal.—See **POOR**, IV. 1.
6. Service of grounds of appeal.—See **POOR**, IV. 1.
7. Must contain all the objections
relied on.—See **POOR**, IV. 3.

NUISANCE.

Power of vestry to abate, in streets.—
See **HACKNEY COACHES**.

OBJECTION.

To Evidence.

When objection to stamp on promis-
sory note may be made.—See
STAMP, II.

OFFICE.

*I. What, in Municipal Corporations,
entitles to Compensation.*

See **MANDAMUS**, II. 1.

*II. Grant of an Office incompatible
with previous Office.*

The King granted by a lease the lot
and cope, and all his mineral rights
in the soke of Wirksworth, to A.,
and by the same instrument granted
to him the office of barmaster
within the same, the duties of which
cannot be discharged by the farmer
of the dues:—Held, that as he was
incapable of holding that office,
the grant of it was invalid. *Ark-
wright v. Cantrell*. 582

OFFICER.

Parish Officers.
See **POOR**, IV. 1, 2; VI.

ONUS PROBANDI.

I. On Respondents.

Respondents are not required to
prove the pauper's settlement, un-
3 A

less objected to on the grounds of appeal.—See *Poor*, IV. 3.

II. *Of a Charge mentioned in a Will, by a Party claiming the legal Estate.*

Where a devise, after reciting that the estate at H. was charged with —*l.* a year, gave it to his trustees in trust to keep down the interest on the said charge, and to apply the residue of the rents and profits until P. B. attains the age of 23, and then to him absolutely:—Held, on ejectment brought by P. B., who was proved to have been in possession, that it was not incumbent on him, after putting in the will, to prove that the charge mentioned therein had not granted the legal estate elsewhere. *Doe d. Beck v. Heakin.* 660

ORDER.

I. *Of Sessions, when conclusive.*

See *Poor*, V. 1.—JURISDICTION, I. 6.

II. *Of Judge, when Decision of full Court is pending.*

See *PRACTICE*, III. 2.

OVERSEER.

I. *Accounts of Assistant Overseer.*

Appeal lies against the accounts of an assistant overseer. *The Queen v. Watts.* 367

II. *Signature by, to Grounds of Appeal.*

See *Poor*, IV. 1, 2; VI.

III. *Time for Appealing.*

The next quarter sessions for appealing against an overseer's accounts, are the sessions after the accounts have been published and deposited with the parish officers for public inspection. Thus, where the accounts of an overseer were examined and allowed at vestry on April 2, and by two justices on April 3, but were not delivered by the overseer to his successor till

May 8:—Held, that the next sessions after May 8 were the proper sessions to appeal to. *The Queen v. Watts.* 367

PARISH.

Power in Poor Law Commissioners to join to unions.—See *Poor*, II.

PARTIES.

Where one of several defendants is agent to the plaintiff.—See *ESTORPEL*, IV.

PLEADING.

I. *Generally.*

Allegation of a Trust.

To a mandamus to churchwardens to make a rate to repay monies borrowed on the credit of the church-rates, it was pleaded that a fiat in bankruptcy had issued against one of the lenders; to which it was replied, that the lenders had advanced the money as trustees, out of money vested in them as trustees, and that the lender, who had become bankrupt, was only interested therein as trustee:—Held good on special demurrer, alleging for cause that there was no statement of the mode by which the trust was created, or how the money was vested in them as trustees. *The Queen v. The Churchwardens of Brancaster.* 580

II. 1. *Declaration.*

1. In ejectment.

See *EJECTMENT*, II.

2. *Number alleged in Declaration, when material.*

The declaration set out a contract of sale of not less than 5000 nor more than 6000 trees, to be taken up at the proper time of the year, to be delivered to the defendant's order, and to be paid for on delivery. Averment, that the plaintiff took up 6000 at the proper time of the

year, and tendered them to the defendant, but that the defendant refused to accept them. Plea, first, that the plaintiff did not properly take up, or tender, or offer to deliver to the defendant 6000 trees:—Held, on special demurrer, that the plea was not ill, although it tendered a traverse on the number of trees, as the plaintiff had made the number material by his allegation in the declaration, which was without a videlicet; secondly, that the plea was bad for duplicity, for traversing both the proper taking up and offer to deliver the trees. *Smith v. Dixon.* 1

III. General Issue.

1. Non assumpsit in an attorney's bill, does not put the fact of a bill being delivered in issue.—See ATTORNEY, II.
2. Not guilty in trover, agency cannot be shewn under.—See BANKRUPT.
3. The fact of a banker's cheque being post-dated, need not be specially pleaded. *Field v. Woods.* 117
4. Non damnificatus improper by surety sued on bond, although the damages only nominal.—See GUARANTIE.

5. Amounting to the General Issue.

5. A plea to a count for trees sold on a special contract, which averred that the trees which the defendant bargained for were trees growing in A., and that the trees which plaintiff tendered were not such trees, was held to amount to the general issue. *Smith v. Dixon.* 1

6. To Declaration on Attorney's Bill.

Bill not duly delivered, must be pleaded specially.

IV. Plea of Set-off.

Applies to the final balance due to plaintiff on the whole declaration.—See ARBITRAMENT, I.

V. Plea of the Custom of Trade must aver what the Custom is.

The second plea averred, that by the custom of trade (without averring what trade) the plaintiff ought not to have taken up the trees without the defendant's order:—Held, bad. *Smith v. Dixon.* 1

VI. New Assignment, when required.

In an action on the case for disturbance of common, where the defendant justifies on the days and times &c. under a right of common for his cattle levant and couchant, the plaintiff must new assign, if he intends to prove a surcharge. *Bowen v. Jenkins.* 87

VII. 1. Replication, de Injuriâ, when proper.

Assumpsit by indorsee against acceptor of two bills of exchange. Plea, that the defendant accepted the bills for the accommodation of the drawer, and that the drawer gave the plaintiff divers other bills of exchange, and that it was agreed between the drawer and the plaintiff, that in consideration of the premises, the plaintiff should forbear to sue the drawer on the first-mentioned bills of exchange, until default in payment of the latter; that the said bills were delivered and accepted by the plaintiff in payment of the first-mentioned bills, and that the agreement was made without the privity of the defendant. Replication, de injuriâ:—Held good, on demurrer. *Reynolds v. Blackburn.* 136

2. When Replication joining Issue on Plea does not admit the Inducement.

In a declaration in prohibition, the plaintiff complained of a rate for the repair of a parish church which had been laid on three only out of four townships, of which the parish was composed, and he alleged that all four were liable to contribute.

The defendant claimed exemption for the fourth township, H., and in his plea alleged that it had a separate chapel of its own, where the inhabitants had immemorially enjoyed all divine rites, and which they had immemorially repaired by rates laid exclusively upon the chapelry. The plea concluded with a traverse of the allegation of the liability of the four townships to contribute to the repairs of the parish church, and the plaintiff joined issue thereon:—Held, that the plaintiff did not thereby admit all the facts stated in the inducement, but that the defendant was bound to prove them, or so much of them as was required to establish the exemption claimed by him. *Croven v. Sanderson*. 641

VIII. In particular Actions.

Against sheriff for escape.—See *Costs*, II.

By executors, for tort to estate of testator.—See *EXECUTOR*, IV.

On policy of assurance, alleging negligence of crew.—See *INSURANCE*, II.

IX. Time for Pleading.

See *PRACTICE*, III. 1, 2.

POLICY.

See *INSURANCE*.

POOR.

I. *Poor's Rate*.—See *RATE*, II.

II. Government of Poor.

Power of Poor Law Commissioners to make Unions.

The Poor Law Commissioners have power, under the 26th section of 4 & 5 *Will. 4*, c. 76, (the Poor Law Amendment Act), to unite parishes for the government of the poor, although one of those parishes has a local act for the management of the poor, and although neither the trustees nor guardians appointed under the local act, nor the rate-

payers of the parish, consent to the union. *The King v. Poor Law Commissioners*. 8

III. Settlement of Poor.

1. By Estate.

A pauper tenant in fee of freehold and copyhold land, conveyed by lease and release his freehold land to certain trustees, upon trust to sell and pay his debts, and pay the surplus, if any, to him. The release contained a covenant on the part of the pauper to surrender his copyhold land in D. upon the same trusts as the freehold. The release also contained a declaration that the trustees should manage the farming business of the pauper until the sale should be made. It did not appear from the case, which stated the above facts, what was the value of the property, or the amount of the debts. It was held that the pauper (who did not actually reside on the property, but in the parish) gained a settlement by a residence of forty days in the parish where the copyholds were situate, during the period between the execution of the deeds of lease and release, and a surrender of the copyhold, which was afterwards made by the pauper to a purchaser. *Rex v. Inhabitants of Ardsleigh*. 240

2. By Renting a Tenement.

Where there is a demise of land, and other things at a fixed rent, and the sessions find that the land alone is worth 10*l.* a year, a settlement may be gained by occupation under the demise, and the instrument is not void, although it attempt to demise incorporeal tenements by writing not under seal. *The Queen v. The Inhabitants of Hockworthy*. 383

IV. Order of Removal.

1. Appeal against.—Grounds of Appeal.

A statement of grounds of appeal

against an order of removal, under the 5 & 6 Will. 4, c. 76, s. 81, signed by the majority of parish officers, is good, and service on one of the officers only is good, if without fraud. *The King v. The Justices of Warwickshire.* 153

2. Signature of Notice of Appeal.

Where an appellant parish gives a notice of appeal against an order of removal, signed by eight parish officers, and afterwards a statement of grounds of appeal, signed by four only:—Held, that they are not estopped from shewing that the latter is signed by the proper number. *The Queen v. The Inhabitants of Church Knowle.* 359

3. Evidence required of Respondents on Appeal.

It is not necessary for the respondents to give evidence of the settlement on which they removed the pauper, unless the appellants have pointed out an objection to it in their grounds of appeal. *The Queen v. Inhabitants of Hockworthy.* 383

4. Quashed Order, when conclusive.

1. Where an appeal against an order of removal has been quashed by consent, at the instance of the respondent parish, but without communicating to the appellants the grounds on which it was quashed, the order of sessions is conclusive between the two parishes. *The Queen v. Inhabitants of Church Knowle.* 359
2. The respondents had obtained an order of removal on a settlement by hiring and service in the appellant parish, but the copy of the examination on which the pauper was removed did not state any residence by him in the appellant parish; the respondents, on discovering this omission, procured their appeal to be quashed by consent of the appellants, but did not

communicate on what grounds, either to the sessions or the appellants:—Held, that the order of sessions, quashing the order of removal, being general, was a decision on the merits. *Ibid.*

5. Evidence under Examination of Pauper.

1. The copy of the examination sent with an order of removal stated, that the hiring and service took place in 1813, but at the hearing of an appeal against this order, the same witness stated that the hiring and service took place in 1810, and not in 1813; the sessions held that this was a fatal variance from the statement stated in the copy of the examination, and quashed the order. The Court of King's Bench refused a mandamus to rehear the appeal, as the sessions had decided that evidence of the settlement in 1813 was inadmissible. *Ex parte Brosceley.* 355
Semle, that the decision of the sessions was right, as the 81st section of 4 & 5 Will. 4, c. 76, with regard to the examinations and notices, ought to be strictly construed. *Ibid.*
2. On the removal of a pauper, a copy of his examination was sent with him, which stated as follows: That before May-day, 1829, he was hired by D. P. of T., to serve him for a year, from May-day, 1829, to May-day, 1830, for 3*l.* 10*s.* wages; that he went into his service at T. at May-day, and when he had been there about a fortnight, his master informed him that the servant of his mother, Mrs. P., of M., did not suit her, and asked him if he had any objection to change places with Mrs. P.'s servant, and go and live with her instead of him; that the pauper said he had no objection, and, without having any fresh agreement, he went to M., and served the re-

mainder of his year's service with Mrs. P., and at the end of the year received of her 3*l.* 10*s.*, the amount of his wages. The notice of appeal stated, that the pauper did not in fact gain a settlement in M., by reason of having served first D. P. for a fortnight, at T., and afterwards the mother of D. P. in M., for the remaining part of the year, under the circumstances stated in the examination of the pauper, upon which the order of removal was grounded, and that the contract of service with D. P. was dissolved on the pauper leaving the same. It was held, that the respondents, at the sessions, could not give evidence to shew that D. P. hired the pauper as the agent of his father, that the latter died shortly after May-day, 1829, and that the pauper served out the remainder of his year with his widow, at M., and received his wages, for, though not inconsistent with the hiring stated in the examination, they were new facts to the appellants, which they were not prepared to contest. *The King v. The Inhabitants of Misterton.* 139

V. Order of Maintenance.

It is not necessary for the churchwardens or chapelwardens of a township to sign a notice of an application for an order of maintenance for a bastard child, under the 73rd section of 4 & 5 Will. 4, c. 76, (the Poor Law Amendment Act). *The King v. The Justices of the North Riding of Yorkshire.* 103

POOR'S RATE.

See RATE, II.

PRACTICE.

I. Amendment.—See AMENDMENT.

II. Arrest.

1. Where notice of a scire facias is served upon country bail, two days'

post from London, on the 18th, returnable on the 19th, and the bail render their principal on the 24th:—Held, that the render is in time. *Sanderson v. Brown.* 84

2. *Scoble*, under R. H. T. 2 Will. 4, No. 81, that country bail have eight days after the return of a writ of sci. fa. to render their principal.

Ibid.

III. Time for pleading.

1. Where the time for pleading was out on the 20th, and the defendant on that day delivered several pleas, with a summons for leave to plead several matters, returnable at three o'clock, on the 22nd (Monday), and the plaintiff returned the pleas, and signed judgment as for want of a plea;—the Court, under the circumstances, set aside the judgment, on an affidavit of merits, without costs. *Wilkes v. Ottley.* 99
2. Pending a rule to set aside judgment that had been signed for want of a plea, the defendant obtained the order of a judge to plead several matters, but the Court set aside the order. *Ibid.*

IV. Notice of Trial.

1. A defendant in ejectment, who had obtained ten days' time to plead on the terms of pleading issuably, rejoining gratis, and taking short notice of trial, is nevertheless entitled to a term's notice of any step being taken, if the plaintiff has delayed going on with the action for four terms. *Doe v. Roe.* 237
 2. Where notice of trial has been given for the last sittings in term, in K. B. at which none but undefended causes are taken, the defendant should either instruct counsel to appear, to say that the cause is defended, or should give notice to the plaintiff of its being a defended cause. *Blund v. Warren.* 97
- As to the payment of costs on granting a new trial.—See COSTS, III.

V. *At Trial.*

Discretion of judge to direct an acquittal of one of several defendants.

The application to a judge, in the course of a cause, to direct a verdict for one or more of several defendants in trespass, is strictly to his discretion; and that discretion is to be regulated not merely by the fact that at the close of the plaintiff's case no evidence appears to affect them, but by the probabilities whether any such will arise before the whole evidence in the cause closes. *Sowell v. Champion.* 627

VI. *Miscellaneous.*

As to jurisdiction of full Court over rule disposed of in Bail Court.—See JURISDICTION, I. 1.

In moulding a rule.—See RESTITUTION.

As to affidavits for criminal information.—See AFFIDAVIT, III.

VII. *Affidavits.*

1. Statement of county in jurat, to found criminal information.—See AFFIDAVIT, I.

2. Effect of slanderous matter in.—See AFFIDAVIT, III.

3. Whether an affidavit may be received at sessions as to time of appeal.—See AFFIDAVIT, II.

4. When the sum sworn to in affidavit less than that indorsed on capias.—See BAIL, I.

VIII. *In Ejectment, Mandamus, Quo Warranto, &c.*—See the respective titles.

PRESUMPTION.

Where legal estate will not be presumed to be outstanding from a recital in a will.—See ONUS PROBANDI, II.

Of licence to inclose waste from passive conduct of lord.—See LANDLORD AND TENANT, II.

PRESUMPTION AFTER VERDICT.

See RATE, III.

PRINCIPAL AND AGENT.

Parol Evidence to prove Agency.

1. Parol evidence is admissible to prove that *A. B.*, who entered into a written contract for the purchase of an estate, bought it as the agent of *C. D.* *Marston v. Roe.* 504
2. Agency must be pleaded specially in trover.—See BANKRUPT, II.
3. Affidavit of agent admissible against principal.—See EVIDENCE, III.
4. Where one of the defendants is agent of the plaintiff.—See ESTOPPEL, IV.

PRISONER.

When entitled to his discharge out of custody for contempt.—See SHERIFF, I.

PROCEDENDO.

When the Court will not award against one of several defendants, on an indictment.—See CERTIORARI, III.

PROCESS.

Irregular execution of.—See ATTORNEY, III.

PROHIBITION.

Pleading in.—See PLEADING, VII. 2.

PROMISE.

Entire, cannot be applied to part of the consideration.—See ASSUMPSIT, III. 2.

PROMISSORY NOTE.

See BILLS OF EXCHANGE.

PUBLICATION.

Of libel, what does not amount to?

See EVIDENCE, X.

QUO WARRANTO.

I. *Where it lies.*

1. *When the Office is full de facto.*
The persons declared to be elected

as town councillors by the mayor or ward alderman, at a municipal election, and who had accepted of-
fice and made the proper declaration, can only be removed from office by a quo warranto information, and therefore a mandamus does not lie to admit other candidates who had the majority of votes. *Rex v. The Mayor &c. of Winchester.* 274

2. For Office of Town Councillor.

Where the revision of burgess lists for a borough divided into wards, has been made by the mayor and assessors for the whole borough elected under sect. 32 of 5 & 6 Will. 4, c. 76, instead of the assessors for the mayor's ward, under sect. 43, it is ground for the Court granting a quo warranto information against any councillor elected by burgesses so revised. *The Queen v. Parry.* 414

II. Discretion of Court in granting.

1. If a quo warranto information will probably dissolve a corporation, the Court will exercise a discretion as to granting it. *Ibid.*
2. Where the revision of the burgess lists took place before assessors elected for the whole borough, instead of the assessors of the mayor's ward, and it appeared that this course was adopted bonâ fide in pursuance of legal advice, and no improper motive or injurious consequences were pointed out, the Court refused to grant a quo warranto information, which would probably have had the effect of dissolving the corporation. *Ibid.*

III. Who is a good Relator.

1. A party who has been a candidate and voted at an election, is not a good relator of a quo warranto information, which seeks to impeach the validity of that election, but his affidavits may be used by a rated

inhabitant, to whom the same objection does not apply, even although the affidavits of the latter would not be sufficient without the former. *Ibid.*

2. A burgess of a corporation is a good relator of a quo warranto information, although the effect of the information would be to dissolve the corporation. *Ibid.*

IV. Practice in Quo Warranto.

1. Consolidation of several Informations.

Where there are several quo warranto informations pending against the aldermen of a borough founded on the same objection of title, the Court has not the power to make a rule binding either party to submit to the result of the first information tried. *The King v. Cozens.* 164

2. Discontinuance under 7 Will. 4 & 1 Vict. c. 78.

The 7 Will. 4 & 1 Vict. c. 78, s. 20, only operates as a conditional discontinuance of proceedings previously commenced; and therefore it was held that a defendant, who wished to avail himself of it, must have offered to pay the costs incurred by the prosecutor, otherwise he could not claim to stay the proceedings. *The Queen v. Jones.* 577

RATE.

I. Borough Rate.

Certiorari to remove an order of quarter sessions on.—See CERTIORARI, I.

II. Poor's Rate.

Property liable to.

1. Real property must be rated to the poor-rate according to its actual value, as combined with the machinery attached to it for manu-

facturing purposes, without considering whether that machinery be real or personal property, so as to be liable to distress or seizure, or whether it would descend to the heir or executor, or belong, on the expiration of a lease, to landlord or tenant. *The Queen v. Guest.*

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2. By the 10 *Geo. 3*, c. cxiv. a Canal Company was incorporated, with power to make a canal and to take tolls, and by section 49 it was enacted, "that the said tolls shall at all times hereafter be exempted from the payment of any taxes, rates, assessments, or impositions whatsoever, any law to the contrary notwithstanding, other than such taxes, rates, &c. as the land which shall be used for the purposes of the said navigation would have been subject to, if this act had not been made." The 23 *Geo. 3*, c. xlvii. repealed this act, and incorporated another navigation with the above-mentioned, and contained a similar exempting clause as to the tolls to be taken. By the 59 *Geo. 3*, c. cv. the Company were empowered to make a cut, and all the exemptions in the former act were extended to the purposes of that act; and by section 17, the lands, houses, wharfs, warehouses, and other houses of the Company were to be rateable to the poor, as lands &c. of a like quality, where the same shall be situate.

Held, 1st, That the land occupied by the original line of the canal was to be rated as land, without reference to its use as a canal, according to the annual value of the adjoining land at the time of the making the rate.

2d. That the *lands* mentioned in section 17, meant the land of the canal covered with water.

3d. That the branches of the canal must be considered as part

of the whole navigation, and were rateable on the same principle.

The 23 *Geo. 3*, c. xlvii. s. 31, which contained the exempting clause from rates and taxes of the tolls of the canal, excepted therefrom quays, wharfs, warehouses, or other houses.—Held, that wharfs erected by the Company erected on their branches, were to be rated according to their annual value to let. *The Queen v. Leeds and Liverpool Navigation Company.* 541

III. Church Rate.

Ground of Exemption from.

A township had from time immemorial a separate chapel, where all ecclesiastical rites and services had been accustomed to be performed by the inhabitants of such township, and which they had been accustomed to repair by rates levied upon themselves, and they had never been rated to the repairs of the parish church. A plea setting forth these facts concluded with an averment that the inhabitants were exempt from contributing to the repairs of the parish church; and upon the trial the jury found for the defendant.—Held, that after this verdict it might be presumed that they had found that the chapel was *coeval with* and not built *in aid or care of* the parish church, and if so the chapelry might be exempt; the Court therefore refused to allow the plaintiff to enter a verdict for him *non obstante veredicto*.

Where a chapel has been built under the 58 *Geo. 3*, c. 45, and the 3 *Geo. 4*, c. 72, it must be repaired by the parish or *place* in which it is built, and those places only are to be called upon to pay the rates which were previously liable to be assessed to the repairs of the church or chapel of that *place*. Therefore

where a township was previously exempt from the repairs of the parish church, it was held not to be liable to be rated for the repairs of a chapel built under those statutes within the parish, but not within the township. *Craven v. Sander-son*. 641

IV. Sewers' Rate.

How to be laid.

A rate made by commissioners of sewers upon a township at large, is bad. *Emmerson v. Saltmarsh and others*. 446

RATIHABITIO.

See DISTRESS, 1.

RECITAL.

Effect of in will to raise presumption.—See ONUS PROBANDI, II.

RECOGNIZANCES.

1. Power of Court of Exchequer to estreat.—See JURISDICTION, II.
2. Power of quarter sessions.—See JURISDICTION, III.
3. When court of quarter sessions have estreated improperly.—See CERTIORARI, I.
4. Duty of the clerk of the peace with respect to.—See CLERK OF THE PEACE, I.
5. Where no recognizances have been given by defendant, when the indictment is removed by certiorari.—See CERTIORARI, III.

RECORD.

Amendment of nisi prius record.—See AMENDMENT.

RELATOR.

Who may be.
See QUO WARRANTO, III.

RELIEF.

To sheriff under Interpleader Act.—See INTERPLEADER.

REMOVAL.

See POOR, IV.

REPAIRS.

See DAMAGES, II.—LANDLORD AND TENANT, III. 2.

REPRESENTATION.

As to the ability of another.—See FRAUDS, III.

REPUTATION.

See EVIDENCE, V. 1, 2, 3.

REQUESTS, COURT OF.

Liability of Officer of Court, on Money paid in.

By a local act the Commissioners of a Court of Requests were empowered to order debts, when recovered by its process, to be paid by instalments, and under such terms and conditions as might appear reasonable and just to them. They made an order whereby the payments were directed to be made to a person who was then the deputy steward of the Court. Payments were made to him, and in consequence of the plaintiffs not applying for them, a large sum had accumulated in his hands, when his principal died and he was removed:—Held, that the Commissioners not having revoked his authority, nor issued any other order, a mandamus would not lie at the suit of the succeeding steward, to compel the late deputy to pay over the accumulations to such successor. *The Queen v. Watson*. 595

RESTITUTION.*Writ of in Ejectment, when grantable.*

A plaintiff in ejectment having recovered a judgment, sued out a writ of possession after the lapse of more than a year, without having issued a scire facias, and obtained possession of the land. The writ of possession was set aside by a judge at chambers, but the lessor of the plaintiff refused to give up the possession. A rule nisi having been obtained for a writ of restitution, the Court, on the argument of the rule, refused to grant that writ, but ordered the lessor of the plaintiff to deliver up the possession to the defendant. *Doe d. Stevens v. Lord.* 604

RESTRAINT OF TRADE.See **TRADE.****RETAINER.**See **EXECUTOR, III.****RETURN.**

To commission to examine witnesses abroad.—See **COMMISSION.**
To mandamus.—See **PLEADING, I.**

REVISION.

Of burgess lists.—See **QUO WARRANTO, I. 2; II. 2.**

REVOCATION.

Of will.—See **WILL, I. II.**
Of tenancy at sufferance.—See **LANDLORD AND TENANT, II.**

RULE.

Cannot be reopened in full Court after decision in Bail Court.—See **JURISDICTION, I. 1.**
For relief of sheriff.—See **INTERPLEADER.**

Will be moulded by the Court.—See **RESTITUTION.**

SAVINGS' BANKS.

What is the proper remedy against trustees of, when the deposit money has been embezzled.—See **MANDAMUS, I.**

SALE.See **ASSUMPSIT.****SCIRE FACIAS.**

To estreat recognizances.—See **JURISDICTION, III.**

To repeal the grant of a franchise.—See **MARKET.**

Time for render by bail, after notice of.—See **PRACTICE, II. 1, 2.**

SESSIONS (QUARTER).*On Rejection of Evidence.*

1. Decision of, where final.—See **JURISDICTION, I. 6—POOR, IV. 4. 1; IV. 5. 1, 2.**
2. Decision on borough rate.—See **CERTIORARI, II.**
3. Authority to estreat recognizances.—See **CERTIORARI, I.**
4. Practice at.—See **POOR, IV. V.**
5. Admission of affidavit at hearing of appeal against overseers' accounts.—See **AFFIDAVIT, II.**

SEIZURE.

Irregular, under regular process, liability for.—See **ATTORNEY, III.**

SERVANT.See **MASTER AND SERVANT.****SERVICE.**

Of notice of grounds of appeal.—See **POOR, IV.**

SET-OFF.

Plea of, not divisible.—See **ARBITRAMENT**, I.

SETTLEMENT.

Of poor.—See **POOR**, III.

SEWERS' RATE.

How to be imposed.—See **RATE**, IV.

SHERIFF.

Liability of Sheriff, with regard to Prisoners for Contempt.

1. In an action of trespass and false imprisonment against the sheriff, the plea justified under an attachment out of the Court of Chancery for a contempt, and that no order was made by the Court to discharge the plaintiff, and no habeas corpus sued out. The replication averred that the plaintiff was kept in custody more than thirty days, without being brought up to the Court, or without being cleared for the contempt, and that it therefore became the duty of the defendant to discharge the plaintiff, according to the statute of 11 Geo. 4 and 1 Will. 4, c. 35, s. 15, rule 5, but that the defendant (though requested) would not:—Held, that in these pleadings there was nothing to shew that the defendant was a trespasser ab initio. *Smith v. Egginton*. 143
 2. And *semble*, that trespass was not maintainable against the sheriff in such a case. *Ibid.*
 3. *Semble* also, that if an action on the case had been brought against the sheriff, it would not have been maintainable without notice to him for what contempt the prisoner was in custody, as a prisoner is not entitled to his discharge at the end of thirty days for all contempts. *Ibid.*
- Liability for neglecting to arrest.—See **COSTS**, II.

Relieved under the Interpleader Act.—See **INTERPLEADER**.

SHIP.

Rights of consignee on bill of lading.—See **BILL OF LADING**.
Implied covenants as to seaworthiness.—See **INSURANCE**.

SIGNATURE.

Of notice in bastardy.—See **POOR**, V.
Of grounds of appeal.—See **POOR**, IV. 1, 2.

STALLAGE.

When claimable.—See **MARKET**.

STAMP.

- I. *An ad valorem Stamp, when sufficient.*
 1. Where an instrument demises several matters, consisting of land and other interests, some of which are incorporeal tenements, at one fixed rent, an ad valorem stamp is sufficient. *The Queen v. The Inhabitants of Hockworthy*. 383
 2. Where, to prove the title of an administrator, an exemplification was offered in evidence, which was an exemplification not only of the letters of administration in question, but also of certain other letters of administration, on one piece of parchment, and covered by one 3*l.* stamp:—Held, that the exemplification was sufficiently stamped. *Doe v. Gunning*. 260
- II. *Objection for want of Stamp, when it may be taken.*

In an action on a banker's check, where the instrument was put in and read without objection, but it afterwards appeared that it was post-dated:—It was held, that being unstamped it could not be given in evidence, and that the objection need not be taken on the first production of the check. *Field v. Woods*. 117

STATUTE.

I. *Generally.*

Local act not superseded by subsequent general act.

See HACKNEY COACHES.

II. *Construction.*

See CONSTRUCTION, 1.

III. *Decisions on particular Statutes.*

3 *Jac.* 1, c. 7 (Attornies). Particulars of attornies' bill.

See ATTORNEY, II. 1. 1, 2.

29 *Car.* 2, c. 3 (Statute of Frauds). Agreement relating to land.

See FRAUDS, I.

9 & 10 *Will.* 3, c. 15. (Arbitration.)

See ARBITRAMENT, III.

8 *Ann.* c. 14 (Landlord and Tenant). A continuance in possession.

See LANDLORD AND TENANT, III. 1.

22 *Geo.* 3, c. 23 (Attornies). Particulars of attornies' bill.

See ATTORNEY, II.

35 *Geo.* 3, c. lxxiii. (local Street Act). Power to abate nuisances under.

See HACKNEY COACHES.

37 *Geo.* 3, c. 90 (Attornies). Neglect to take out certificate.

See ATTORNEY, I. 1, 2.

38 *Geo.* 3, c. 78 (Newspapers). Proof of publication.

See EVIDENCE, X.

57 *Geo.* 3, c. xxi. (Street Act.) Power to abate nuisances under.

See HACKNEY COACHES.

58 *Geo.* 3, c. 45 (Church Building Act). Who liable to rate for repairs of church.

See RATE, III.

58 *Geo.* 3, c. 93 (Bills of Exchange. Usury.) See BILLS OF EXCHANGE.

3 *Geo.* 4, c. 46 (Recognizances). Power of the Court of Exchequer to estreat.

See JURISDICTION, II.

5 *Geo.* 4, c. 84 (Gaol Act). Fees to which clerks of the peace are entitled on convictions.

See CLERK OF THE PEACE, II.

7 *Geo.* 4, c. 119, ss. 4 and 7 (Insolvent Act). Proof of provisional assignment.

See EVIDENCE, VI.

9 *Geo.* 4, c. 14 (Lord Tenterden's Act). Representation as to the ability of another.

See FRAUDS, III.

9 *Geo.* 4, c. 92 (Savings' Banks). Remedy for depositors.

See MANDAMUS, I. 1.

11 *Geo.* 4 & 1 *Will.* 4, c. 35, s. 15 (Chancery). Imprisonment for contempt. See SHERIFF, 1, 2, 3.

1 & 2 *Will.* 4, c. 22 (Hackney Coach Act). Power given to vestries.

See HACKNEY COACHES.

1 & 2 *Will.* 4, c. 58 (Interpleader Act). Rights of execution creditor preserved.

See INTERPLEADER.

3 & 4 *Will.* 4, c. 27 (Limitations). Title gained by twenty years' possession.

See ADVERSE POSSESSION.

3 & 4 *Will.* 4, c. 42 (Law Amendment Act.)

Sect. 2. Right in executors to maintain trespass.

See EXECUTOR, IV. 1, 2.

S. 24. Costs when judgment entered up according to the right of the case. See COSTS, II.

S. 24. Power of the Court to amend record.

See AMENDMENT, 1.

3 & 4 *Will.* 4, c. 98 (Bills of Exchange).

S. 7. Examined on roll.

See BILLS OF EXCHANGE.

S. 7. Usury. See *Ibid.*

5 & 6 *Will.* 4, c. 41 (Bills of Exchange.)

See BILLS OF EXCHANGE, I. 2.

4 & 5 Will. 4, c. 76 (Poor Law Amendment Act.)

S. 26. Power to unite parish with local act.

See POOR, II.

5 & 6 Will. 4, c. 76.

S. 32. Election under.

See QUO WARRANTO, I. 2.

S. 66. Compensation to displaced officers.

See MANDAMUS, II.

S. 66. Whether the decision of the Lords of the Treasury on compensation final.

See JURISDICTION, I. 4.

S. 81. Construction of.

See POOR, IV. 1.

S. 123. Takes away certiorari in case of borough rate.

See CERTIORARI, II.

7 Will. 4 & 1 Vict. c. 78 (Corporation Amendment Act). Discontinuance of quo warranto informations.

See QUO WARRANTO, IV.

1 Vict. c. 26 (Wills). Effect of intestacy to bar dower since the statute.

Marston v. Roe. 504

STREET.

Nuisance in, power to abate.—See HACKNEY COACHES.

SURETY.

See GUARANTEE.

SURCHARGE.

See PLEADING, VI.

TENANT.

See LANDLORD AND TENANT.

TENDER.

What amounts to.

See EVIDENCE, VIII.

TENEMENT.

Incorporeal.—See STAMP, I. 1.

TESTATOR.

Competency of.

See EVIDENCE, V. 2.

TIME.

For motion against an award.—See ARBITRAMENT, II.

For appeal against overseers' accounts.—See OVERSEER, II.

For appeal against orders of removal.—See POOR, IV. 2.

Given on a bond debt.—See ASSUMPSIT, III. 1.

To make objection to evidence.—See STAMP, II.

TITHES.

Where the Incumbent de facto, though not de jure, may sue.

The incumbent of a benefice, void as aforesaid, may sue for tithes from his parishioners till sentence of deprivation, or until another clerk is presented by the patron. *Aldon v. Atlay.* 492

TITLE.

No title acquired by twenty years' possession, terminated before the passing of 3 & 4 Will. 4, c. 27, s. 7.—See ADVERSE POSSESSION.

TOWNSHIP.

When not liable to church-rate.—See RATE, III.

TRADE.

Covenant in restraint of. What good.

Certain persons, who were carriers from London to various parts of Norfolk, and other places, agreed to relinquish their trade of carriers on a particular branch of their line for ever, in favour of A. The only consideration for the agreement was an undertaking by A. to pay them for one year a third part of

the carriage of one kind of goods :
—Held, that this agreement was
not injurious to the public, and that
as the Court could not say that the
consideration for the restraint was
inadequate, a covenant enforcing
the agreement was not illegal.
Archer v. Marsh. 562

TRANSPORTATION.

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USE AND OCCUPATION.

By Mortgagee after Notice.

On the execution of an agreement by which *H.* had agreed to make an assignment of the premises to *E.* for 7 years, *H.* assigned the premises for 99 years, and then became bankrupt:—Held, that the mortgagee could maintain use and occupation, in respect of occupation after the mortgage to him, and notice of that mortgage to the defendant. *Rawson v. Eicke.* 423

WAIVER.

Right to bring action for money had and received, not waived by action for subsequent trespass.—See EXECUTOR, IV.

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Determination of.—See LANDLORD AND TENANT, II.

Competency of testator to devise.—See EVIDENCE, V. 2, 3.

I. *Revocation of, by Marriage and the Birth of Issue.*

1. Where marriage and the birth of issue operate as a revocation of a will of real property, it is in consequence of a rule of law independent of the intention of the testator, and therefore all evidence as to such intention is inadmissible.

The rule of law is, that where an unmarried man, without children, makes his will, devising the whole of his real property, and leaves no provision for any child of a subsequent marriage, the law annexes the tacit consideration that subsequent marriage and the birth of a child operate as a revocation of the will.

Provision for the future wife only is not sufficient to prevent the revocation.

2. *Seemle*, that the fact of property acquired subsequently to the will, descending upon the issue, would not prevent the revocation of a will of the whole of the testator's then estate, made prior to his marriage and the birth of issue. *Marston v. Roc.* 504

3. Where *J. F.* devised all his real estates at law and in equity to *W. M.*, subject to a life estate in them to *A. B.*, with whom he contemplated and afterwards contracted marriage, and by whom he left issue:—Held, that neither the contemplation of marriage nor the provision for his future wife in his will, operated to prevent its being revoked by his subsequent marriage and the birth of issue. *Ibid.*

II. *Revocation at Common Law by Intention of the Testator.*

At common law, a will may be revoked by any act of the testator which shews his intention, without the use of any words whatever.

Therefore where a testator threw his will on the fire, which was

rescued from the flames by the devisee, so that though the wrapper was partially burnt, the will was not affected by the fire, and the testator expressed his displeasure, and declared he would make another will, but did not use any language declaratory of his intention to revoke his will:—Held, in an ejectment by the heir at law to recover copyhold property, that it was properly left to the jury to say whether what was then done by the testator was an actual intended revocation of the will.

Held also, that the mere knowledge by the deviser of the will's having been preserved, and his not again attempting to destroy it or make another, were not of themselves evidence of a republication.
Doe d. Reed v. Harris. 615

III. *Effect of Intestacy to bar Dower.*
See DOWER.

WORK AND LABOUR.

Not maintainable on broken executory contract, *semble*.—See MASTER AND SERVANT, I. 3.

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